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In the

Supreme Court of the United States

OCTOBER TERM, 1998

AMSTERDAM VIDEO INC., *et al.*,

Petitioners,

vs.

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves an unprecedented use of the collateral estoppel doctrine to frustrate and avoid this Court's jurisdiction to review the merits of a major First Amendment claim involving free expression exercised by over 100 video stores, cabarets and theaters in New York City. The case stems from an ordinance that regulates the zoning of "adult establishments" throughout the five boroughs of New York City. A federal district court issued a *Pullman* abstention order that retained federal jurisdiction over the First Amendment claims pending a remand to New York state courts for a determination of the state constitutional free speech claims. When those claims were rejected by the state courts, the federal district court refused to review the Petitioners' distinct First Amendment claims based upon collateral estoppel. Thus, the Petitioners' First Amendment claims are now ready for disposition by the federal district court, but for the following QUESTIONS PRESENTED:

1. Whether the federal full faith and credit statute, 28 U.S.C. § 1738, precludes a party from litigating in federal court a First Amendment claim involving free expression where that court had previously entered a *Pullman* abstention order that (a) retained federal jurisdiction over the First Amendment claim pending (b) a remand to state courts to exercise their jurisdiction over similar free speech claims under the state constitution, and where an *England* reservation of federal issues was filed?

2. Whether the federal full faith and credit statute precludes a party from litigating a First Amendment claim involving free expression in a federal court where the state courts, following a *Pullman* remand order, had rejected free speech claims under the state constitution by addressing the "same issues" and applying the "same standards" as would be applicable to the First Amendment claim?

3. Whether the Second Circuit's use of the collateral estoppel doctrine makes it impossible for First Amendment claimants to urge that federal free speech standards be changed or reconsidered?

4. Whether the radical requirement that 84% of all pre-existing adult businesses must either close or relocate to remote areas of the City violates the First Amendment because such a large scale suppression of free speech is in direct conflict with *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 62 n. 35 (1976)?

STATEMENT PURSUANT TO RULE 29.6 AND LIST OF PARTIES

Petitioners, who were the Appellants in the proceedings before the Second Circuit, represent approximately 100 operators of video stores, theaters and other businesses, that provide various forms of adult entertainment to the public in all five boroughs of New York City. None of the corporate Petitioners has any parent companies or nonwholly owned subsidiaries that need to be listed pursuant to Rule 29.6.

The Petitioners are:

Amsterdam Video Inc.
A & X Entertainment Inc., d/b/a Playpen II
Adult Video, Inc.
Ascot Space Amusement, Inc., d/b/a Ascot Theatre
Big Apple Cinemas Inc., d/b/a Show Follies Theater
Brett Distributors, Inc., d/b/a Media Distributors
Capri Cinema Inc.
Capwell Entertainment, Inc., d/b/a Legz Diamond's Playhouse
Church Street Café Inc., d/b/a Baby Doll Lounge
College Pt. Rest. Corp., d/b/a Gallagher's II
Crazy Fantasy Video, Inc.
Cupid's Treasures, Inc., d/b/a Banana Video and Unicorn
Dara Distributors Inc., d/b/a Love Shack
Desire Video Inc.
E & A Books, Inc.
E & A Video and Magazine Inc.
Ed-Mart Bar & Grill Inc., d/b/a Penny Whistle
For The People Theatres of N.Y., Inc., d/b/a Fair Theatre
Four Keys Enterprises, Inc., d/b/a Hollywood Peepshows
Fourteenth St. Enterprises Inc., d/b/a All Male Adult Video
Fun City Video Corp.
G & D Merchandise Corp., d/b/a Peepland
Gotham Exhibitor Inc., d/b/a Peep O Rama
Helen Wolff Ltd., d/b/a Come Again
I.S. Sultars Inc.
J & J Tummy Yummies Corp., d/b/a Naked City
JGJ Merchandise Corp., d/b/a Peepland/Valentina's II

JHM Video Corp.
JUM Operating Corp., d/b/a Peepland
JVR Video Center Inc., d/b/a Playground
Kinematics Merchandising & Distributors, Inc.,
d/b/a Kinematics
Kisma Video, Inc.
L &T Video, Inc., d/b/a Badlands Adult Video
Madeline D'Anthony Ent. Inc., d/b/a Harmony Theatre
Manhattan Video, Inc.
Marquis Video Inc., d/b/a Marquis Video
Mirage Productions Inc. d/b/a Love Shack
Montana Holdings Inc., d/b/a Runway 69
Nawan Entertainment Inc., d/b/a Euro World
Nilupul Video Inc.
N.R.S. Video Inc.
NY Video Inc., d/b/a Love Shack
Pabon Theatre Corp., d/b/a Eros Theatre
Peregrine Enterprises, Inc., d/b/a Paradise Club
R.E.J.M., Inc., d/b/a Big Top Lounge
Ron Bob Pub Inc., d/b/a Gallagher's
Sami's Video Warehouse Inc.,
d/b/a Warehouse on the Block Ltd.
Serendib Video Inc., d/b/a Serendib Video
SPH Video Corp.
Star Distributors, Ltd.
Statewide Video Inc.
Steam Heat Inc.
STS Video Inc., d/b/a Adult Video
Suemar Video, Inc., d/b/a Goodtime Video
Third Avenue Entertainment Inc., d/b/a XXX Video
Thunder Video Inc.
Town Video Sales, Inc., d/b/a Les Hommes Book Shop
Video, Video, Video Inc.
Video 30 Of Queens Inc., d/b/a ECSXXXTASY Video
West Video Inc.
Zideo Video Inc.
21 Ann Street Corp.,
d/b/a Ann Street Adult Entertainment Center
130 C Street Corp., d/b/a Christopher Street Book Shop

155 Video Center Corp., d/b/a Peepworld
300 Book Center
303 W. 42nd Street Enterprises Inc., d/b/a Show World
320 W. 45th St. Rest. Corp., d/b/a Private Eyes
323 Canal St. Inc.
35-30 38th St. Corp., d/b/a Cityscape
412 8th Ave. Corp., d/b/a Nude York City
45-08 Vernon Blvd. Corp. d/b/a Riverhead Inn
603 Video Inc.
610 Video Store Inc.
691 Video Center Corp.
691 8th Ave. Corp.
693 Video Corp., d/b/a TNL Video
711 Associates Ltd., d/b/a Peepland
729 6th Avenue Corp., d/b/a Billy's Topless
733A Corp., d/b/a Video Palace
763 Video Store Inc.
777-779 8th Ave. Corp., d/b/a Hollywood Twin and
81-22 Baxter Av. Lounge Inc., d/b/a Ilda's Place II

The Respondents, who were appellees and intervenors before the Second Circuit, are:

The City of New York
Hon. Rudolph W. Giuliani, as Mayor of the City of New York
Joseph B. Rose, as Director of City Planning,
Department of City Planning of the City of New York,
Gaston Silva, as Commissioner of Buildings,
Department of Buildings of the City of New York
Times Square Business Improvement District
Center For The Community Interest
Bellaire/Bell-Vill Civic Association
Bnos Israel Girls' School
Bowne Park Civic Association
Briarwood Community Association
Bronx Community Board #12
Brooklyn Civil Council
Brooklyn Tenants Council
Cardinal Spellman High School
Coalition of United Residents for a Safer Environment

College Point Board of Trade
Committee for a Better and Safer Nostrand Avenue
Communities of Masbeth and Elmhurst Together
Community School District 21 Presidents' Council
Congregation Bnai Shloima Zalman
Crown Heights Taxpayers and Civic Association
Douglaston Civic Association
East Midwood Neighborhood Association
Councilmember Andrew Eristoff
Grand Central Partnership
Holliswood Civic Association
Hudde Junior High School Parents Association
Jackson Heights Community Development Corporation
Kings Highway District Management Association
Kingsway Jewish Center
Lawyers' Committee on Violence
Manhattan Terrace Civic Associaiton
Councilmember Helen Marshall
Midwood Civic Action Council
New Northern Boulevard Business Association
Northern Boulevard Merchants' Association
100-299 East 77th Street Block Association
Prospect Park Yeshiva
Queens Braddock Civic Association
Queens Village Civic Association
Real Estate Board of New York
Residents Against Street Prostitution
Rosedale Block Association
Rosedale Civic Association
Councilmember John Sabini
34th Street Partnership
United Civic Council of Queens
United Community Civic Association
Councilmember Anthony Weiner
West 45th Street Block Association
West 47th/West 48th Street Block Association and
West 90's/West 100's Neighborhood Coalition

Defendant Gaston Silva has succeeded, and been substituted for, Joel A. Miele, Sr., as the Commissioner of Buildings. The American Alliance for Rights and Responsibilities, a defendant-intervenor, has changed its name to the Center for the Community Interest.

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Judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on June 3, 1998, and reported at 146 F.3d 99 (2d Cir. 1998), is reprinted at (A-3).

Order of the United States Court of Appeals for the Second Circuit, entered on March 17, 1998, granting stay pending appeal, is reprinted at (A-30).

Judgment and opinion of the United States District Court for the Southern District of New York (Cedarbaum, J.), dated March 6, 1998, and reported at 997 F. Supp. 418 (S.D.N.Y. 1998), sub nom. *Hickerson v. City of New York*, is reprinted at (A-33).

Judgment and opinion of the New York Appeals dated February 24, 1998, sub nom. *Stringfellow's of New York, Ltd. v. City of New York*, and reported at 91 N.Y.2d 382 and 671 N.Y.S.2d 406 (1998), is reprinted at (A-45).

Judgment and opinion of the United States District Court for the Southern District of New York, dated June 27, 1996, and reported at 932 F. Supp. 550 (S.D.N.Y. 1996), is reprinted at (A-68).

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Amsterdam Video, Inc., et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in the above-captioned proceeding.

Opinions Below

The opinion of the Second Circuit, rendered on June 3, 1998, is reported at 146 F.3d 99 (2d Cir. 1998). It is reprinted in the Appendix at A-3.

The opinion of the United States District Court for the Southern District of New York (Cedarbaum, J.), dated March 6, 1998, is reported at 997 F. Supp. 418 (S.D.N.Y.

1998), sub nom. *Hickerson v. City of New York*. It is reprinted in the Appendix at A-33. An earlier opinion of that court, dated June 27, 1996, is reported at 932 F. Supp. 550 (S.D.N.Y. 1996), and is reprinted in the Appendix at A-68.

The opinion of the New York Court of Appeals in this proceeding, sub nom. *Stringfellow's of New York, Ltd. v. City of New York*, is reported at 91 N.Y.2d 382 and 671 N.Y.S.2d 406 (1998). It is reprinted in the Appendix at A-45.

Jurisdiction

The Second Circuit issued its judgment and opinion on June 3, 1998. Petitioners filed a timely petition for rehearing, together with a suggestion for rehearing en banc. The Second Circuit denied both the petition and the suggestion on July 13, 1998. A copy of that order is reprinted in the Appendix at A-1. This Petition is being filed within 90 days of the rehearing denial order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Second Circuit, on July 17, 1998, denied Petitioners' motion to stay issuance of its mandate pending the filing of this Petition and final action by this Court thereon. On July 22, 1998, Justice Ginsburg denied a motion to stay the issuance of the Second Circuit's mandate pending certiorari proceedings. Thereafter, Petitioners requested that this motion be resubmitted to Justice Stevens, who then referred the motion to the entire Court. On July 28, 1998, the Court denied the motion for a stay.[1]

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[1] This may be one of the most highly publicized and important cases to reach this Court in recent years. Its progress through the state and federal systems has attained national interest – being reported in major newspapers throughout the United States including the LOS ANGELES TIMES, INDIANAPOLIS STAR, DALLAS MORNING NEWS, CHICAGO TRIBUNE, BOSTON GLOBE, PITTSBURGH POST-GAZETTE, ORLANDO SENTINEL, BUFFALO NEWS and WASHINGTON POST. Articles concerning this case appeared in the NEW YORK TIMES on no fewer than twenty occasions. *(Footnote Continued on Following Page)*

Constitutional and Statutory Provisions Involved

United States Constitution, First Amendment:

Congress shall make no law... abridging the freedom of speech...

New York State Constitution, Article I, § 8:

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press.

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit:

The records and judicial proceedings of any court of any such State, Territory or Possession ...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Text Amendment N 950384 ZRY to New York City Zoning Resolutions (adopted October 25, 1995):

The Zoning Resolution first defines the term "Adult Establishment" (§ 12-10). An Adult Establishment is a commercial establishment where a "substantial portion" of the floor area accessible to customers is allocated to, or stock-in-trade is characterized by, an emphasis on "specified sexual activities" or "specified anatomical areas," or a business that "regularly features" films or live performances

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Even Justice Stevens' decision to present the Petitioners' stay application to the entire Court received prominent coverage in numerous papers.

depicting an emphasis on "specified sexual activities" or "specified anatomical areas."

After consigning Adult Establishments to districts that are, for the most part, distinct from the major and secondary shopping centers and retail areas, as well as heavy manufacturing districts, the Ordinance imposes the following location limitations within the few remaining available districts:

(a) Adult Establishments must be located at least 500 feet from a church, school, residential district, or certain commercial and manufacturing districts (§§ 32-01(b), 42-01(b));

(b) Adult Establishments must be located at least 500 feet from another Adult Establishment (§§ 32-01(c), 42-01(c));

(c) Only one Adult Establishment can be located on a zoning lot (§§ 32-01(d), 42-01(d));

(d) Adult Establishments may not exceed 10,000 square feet of floor area and cellar space (§§ 32-01(e), 42-01(e)).

Statement of the Case

This case involves an unprecedented use of the doctrine of collateral estoppel (or issue preclusion) to frustrate and avoid this Court's jurisdiction to review the merits of an important First Amendment free speech claim.

A. The initial filings in the state trial court

1. The event that ignited this important litigation and started Petitioners on the long and arduous journey to this Court occurred on October 25, 1995, when the City of New York enacted an Amendment to its Zoning Resolution (Text Amendment N 950384 ZRY). The Amendment forced the relocation and disbursement of "adult establishments," defined as sexually oriented businesses. In the words of the Second Circuit, the principal provisions of the Amendment was to "limit the permissible locations of adult establishments to non-residential districts and require that they be located within the districts in which they are permitted – at least 500 feet away from any school, day care center, or houses of worship; at least 500 feet from excluded districts; and at least 500 feet from one another." (A-7-8).

2. Prior to November 1994, the Zoning Resolutions of the City of New York made no distinction between adult uses and other commercial uses that did not have an "adult character". While the City regulated several general classes of commercial establishments under its Zoning Resolution, adult-oriented businesses had never been differentiated from other commercial uses (J.A. 215).[2] In the past, adult bookstores and theaters have been allowed to exist in each of the commercial districts where other retail businesses,

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[2] Numbers preceded by "J.A." refer to pages of the consolidated Appendix filed in the Second Circuit. *Amsterdam Video, Inc. v. City of New York*, Dkt. No. 98-7270, and *Rachel Hickerson v. City of New York*, Dkt. No. 98-7269.

including bars and taverns, have been permitted to operate – and where the latter are still permitted to operate. For decades, adult establishments have successfully coexisted with other businesses without prejudice or detriment to each other (J.A. 215, 814-15). Many of these adult establishments have operated at their current locations for more than 20 years without incident (J.A. 215).

3. In 1995, at the time of the enactment of the Amendment, there were at least 177 adult businesses in the City. Under the Amendment, only about 28 of those establishments (about 16% of the total) will be permitted to remain in their present locations. The remaining establishments will be forced to close, change the nature of their businesses, or relocate to remote areas of the City.

4. The Amended Zoning Resolution relegates adult establishments to certain limited zones within the City and effectively bars the continued operation of an existing adult establishment within the primary commercial districts, which are most suitable for retail stores in local and convenient areas. Under the Amended Zoning Resolution, adult establishments are now consigned to districts that are, for the most part, distinct from the major and secondary shopping centers and retail areas, and include heavy manufacturing districts (J.A. 219).

5. On February 27, 1996, more than one hundred adult videostores, theaters and cabarets joined forces and commenced an action in the New York State Supreme Court to have the Zoning Resolution declared unconstitutional.[3] The suit, that sought both declaratory and injunctive relief,

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[3] Simultaneously, four patrons of these establishments filed a similar suit in that state court, *Hickerson, et al. v. City of New York, et al.* Later in 1996, a similar suit was filed by one adult establishment, *Stringfellow's Ltd. v. City of New York, et al.* All three actions challenged the constitutionality of the zoning ordinance. The cases were administratively, although not formally, consolidated for hearing and appeal in the New York court system.

alleged that the Zoning Resolution violated both the state and federal Constitutions. Thirteen of the Petitioners' causes of action were brought under the New York State Constitution. In addition, the fourteenth cause of action alleged that the Zoning Resolution violated Petitioners' rights to free expression and equal protection guaranteed by the First and Fourteenth Amendments to the United States Constitution (J.A. 20-118).

B. The transfer of the case to the federal court

6. New York City immediately removed Petitioners to federal court in the Southern District of New York. The City asserted (a) that the federal court "has original jurisdiction over the claims arising under the United States Constitution pursuant to 28 U.S.C. § 1331," and (b) that the federal court also "has supplemental jurisdiction over the claims arising under the New York State Constitution pursuant to 28 U.S.C. § 1367" (J.A. 18). Shortly thereafter, the City and the other Respondents filed, in the federal Court, answers to the *Amsterdam* complaint (J.A. 143). Issue had never been joined in the state court.

C. The *Pullman* remand to the state courts

7. In April of 1996, Petitioners sought an order from the Southern District (pursuant to 28 U.S.C. § 1447(c)) remanding the entire action to the state court, from whence the case had been removed (J.A. 209). Petitioners argued that because the case involves many difficult and unresolved questions of state law, any court hearing the dispute will have to address a great deal of interrelated state issues prior to reaching the federal issues in the case (J.A. 228).

8. In June of 1996, the district court, abstaining under *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), remanded all state claims to the state court, but retained jurisdiction over the federal cause of action pending

determination of the state claims in the New York courts (J.A. 276). The district court held that the claims made under the state constitution do "*not diminish* the importance of the federal constitutional issues" (A-84).[4]

9. While Petitioners initially opposed the federal court's retention of jurisdiction over the First Amendment claims, they quickly accepted the jurisdictional consequences of the *Pullman* order. Immediately upon the remand of the state issues to the state court, Petitioners' counsel filed a Reservation of Federal Issues, as suggested by this court in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421 (1964), advising the state court that they,

> ... expressly reserve their right to litigate the causes of action asserted in this action arising under the First and Fourteenth Amendments to the Constitution of the United States of America in the federal court system, and submit only those causes of action arising under the New York State Constitution for litigation in the New York State court system (J.A. 309-310).

D. Pursuing the state claims in the state courts

10. During the ensuing state court proceedings, which ranged from the trial court all the way to the New York Court of Appeals, the jurisdictional limitations set by the district court's *Pullman* abstention order were respected.[5] Moreover, following this Court's admonitions in *England*, Petitioners strictly refrained from submitting their First Amendment claims to the state courts in order to preserve their right to litigate them, if necessary, in federal court. In other words, in

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[4] The court also recognized that the language of the First Amendment to the United States Constitution and the text of Article I, § 8 of the New York Constitution are different (J.A. 289).

[5] Petitioners' First Amendment claims, the district court wrote, simply cannot be considered "matters in which state law predominates." (A-84).

light of the district court's retention of their federal cause of action, Petitioners chose not to assert any federal claims in the state proceeding. Their challenge to the Zoning Resolution rested, solely and exclusively, on the state constitution.

11. The state courts fully understood that their jurisdiction, following the remand from the federal court, extended only to the claims made under the New York State constitution. They recognized that the state courts no longer had any jurisdiction to resolve the federal First Amendment claims. In the words of the New York Court of Appeals, the federal district court had "remanded [to the state courts] plaintiffs' causes of action grounded in the State Constitution, retaining jurisdiction over the Federal claims" (A-52).[6]

12. The state trial court, exercising its remanded jurisdiction over the state constitutional claims, was confronted with a "voluminous record of pleadings, affidavits, exhibits and briefs totaling more than 10,000 pages." (A-52). Most of the City's affidavits and exhibits were fiercely contested by Petitioners, but the court refused to permit them to submit reply affidavits and exhibits. The court conducted no trial or hearing to resolve the conflicting affidavits, leaving unresolved many factual disputes. No judicial findings of fact were ever made. Instead, the court granted the City's motion for summary judgment, while denying Petitioners' counter motion. And by accepting the City's version of the contested facts, the court concluded that "the Amended Zoning Resolution does not violate plaintiffs' rights of freedom of expression

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[6] The state trial court, the Supreme Court of New York County, also recognized that the federal court's *Pullman* order had remanded to the state courts only "that portion of the claims arising under the New York State Constitution, holding in abeyance the claims ... predicated on the Federal Constitution." *Stringfellow's of New York v. City of New York*, 653 N.Y.S.2d 801, 803 (Sup. Ct. N.Y. Co. 1996).

guaranteed under the State Constitution, and is, therefore, constitutional." 653 N.Y.S.2d at 814.

13. Petitioners appealed to the highest court of New York. The district court (A-39), summarized the New York Court of Appeals' opinion as follows:

> (a) The state constitutional standards governing the New York City ordinance in question "are substantially the same as the federal standards."
>
> (b) The New York Court of Appeals "relied on both state and federal authority to hold that the Amended Zoning Resolution had a purpose unrelated to speech, imposed restrictions no broader than necessary to implement the legitimate concerns of the legislature, and provided for reasonable alternative avenues of communication."
>
> (c) "Thus, after a thorough review of the record below, the Court of Appeals held that the resolution did not violate the state constitution and could be enforced by defendants."

14. The federal court also noted that the state trial court had found that the New York City ordinance "was not an attempt to regulate speech but rather was motivated by concerns other than those related to speech, and, in particular, by a reasonable belief that adult establishments produce undesirable secondary effects such as neighborhood deterioration, crime and decreased property values . . . and is no broader than is necessary to address the negative effects associated with adult establishments." (A-37).

E. The federal court imposes "collateral estoppel"

15. After Petitioners' state constitutional claims were rejected by the New York courts, they returned to the federal district court to litigate their First Amendment claims over which the district court had retained jurisdiction, under its

earlier *Pullman* order. Petitioners accordingly sought a preliminary injunction to stay enforcement of the Zoning Resolution pending the previously promised resolution of their First Amendment claims.

16. The district court denied the preliminary injunction, without a hearing, concluding that the Plaintiffs' federal claims were barred by collateral estoppel (A-43). The district court found that Petitioners have not shown a likelihood of success on the merits. Presumably, the "merits" referred to by the court were the merits of the First Amendment claim. But the "likelihood of success" was not to be measured, in the court's view, by reference to any independent examination of the First Amendment problem. Rather, the key to measuring "success," or the lack thereof, was found by the court to be within the parameters of the doctrine of collateral estoppel. Under that doctrine, the Petitioners were held to be precluded from litigating in the federal court "the same factual issues that have already been tried and decided in the state court." *Id.*

17. The district judge ruled that there was a complete identity of factual inquiries and standards to be applied in assessing the constitutionality of a "content-neutral zoning ordinance" under either the New York State Constitution or the First Amendment to the United States Constitution. The district judge pointed to this Court's ruling in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986), that "the appropriate inquiry" under the First Amendment is whether such a content-neutral zoning ordinance is (1) "designed to serve a substantial governmental interest," and (2) "allows for reasonable alternative avenues of communication." Both of those inquiries were held to be decisive in assessing the validity of the ordinance under the state constitution. Thus, the district judge concluded,

> Each of those inquiries was necessarily decided in the state court proceedings, and plaintiffs had a full and fair opportunity to litigate the issues in the state courts. Accordingly, if the doctrine applies, those

> issues are precluded from further litigation in this Court under the doctrine of collateral estoppel, now known as issue preclusion. (A-41).

The court also relied upon the federal full faith and credit statute, 28 U.S.C. § 1738, to support the use of the collateral estoppel doctrine to avoid adjudicating the Petitioners' significant First Amendment claims.

18. Finally, the court stated that the Petitioners had offered "no persuasive reason" to relitigate in federal court "the very same issues they litigated in the state courts in order to persuade this Court to reach a different factual result." (A-41). Even the *England*-type reservation of federal issues, that Petitioners had filed in the state court, was held inadequate to prohibit issue preclusion in this case. And why? Because it was claimed that *England* preserves the right to relitigate in federal court all the federal issues "only when the federal court is plaintiff's chosen forum, and plaintiff is forced, over its objection, to litigate those issues in state court" following the entry of a *Pullman* abstention order. But in this case, said the court, Petitioners' chosen forum at the beginning "was emphatically the state court" and, after the City had removed the case to federal court, Petitioners had "fought vigorously to return to their chosen forum, the state court." (A-41).

F. The Second Circuit affirms "collateral estoppel"

19. On the appeal from the district court's decision, the Second Circuit did not treat the case as an appeal from a studied denial of Petitioners' First Amendment claim. Rather, said the Second Circuit, "We review the district court's denial of a preliminary injunction for an abuse of discretion." (A-9). And, the court continued, any party seeking a preliminary injunction must establish not only irreparable injury but also (a) "a likelihood of success on the merits," and (b) "sufficiently serious questions going to the merits to make them a fair ground for litigation." *Id.*

20. Using "abuse of discretion" as the appellate review standard, the Second Circuit concluded that the district court had not abused its discretion in denying the preliminary injunction. That is so, said the Second Circuit, because "we conclude that [Petitioners] are collaterally estopped from relitigating the issues that govern their First Amendment claim, they can show neither 'a likelihood of success on the merits' nor 'sufficiently serious questions going to the merits to make them fair ground for litigation." *Id.*

21. The critical assertion of the Second Circuit was that the issues decided and the standards applied by the New York state courts in rejecting Petitioners' state constitutional claims "are the same that would be applicable to [Petitioners] First Amendment claim." (A-11). Reference was made to the decision of the New York Court of Appeals in this proceeding that, for purposes of resolving the state constitutional free speech claims, the state courts had adopted and applied the First Amendment standards announced by this Court more than a decade ago in *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 49-50.[7]

22. Because of the perceived identity of the federal and state free speech standards, the Second Circuit held that Petitioners had "a full and fair opportunity to litigate these [federal] issues" in the course of litigating – in the state courts – the state constitutional claims. (A-22).

23. As to the *Pullman* abstention order, which had expressly reserved jurisdiction to consider the First Amendment free speech claim in the federal court, the Second Circuit simply held that the District Court did indeed exercise its retained jurisdiction. It did so by holding that

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[7] As indicated, in *Renton*, this Court established three standards or principles for determining whether an adult-establishment zoning ordinance complies with the free speech provision of the First Amendment: (1) The ordinance must be content neutral; (2) the ordinance must serve substantial governmental interests; and (3) the ordinance must leave open reasonable alternative avenues of communication.

Petitioners were collaterally estopped, under the federal full faith and credit statute, from relitigating the federal claim in the federal court.

24. With respect to the *England*-type Reservation of Federal Issues that Petitioners had filed in the state courts, the Second Circuit said that this Court has "appeared to suggest ... that an *England* reservation would only be available when the federal courts were a litigant's initial forum of choice." (A-23). Since Petitioners had originally filed both their federal and their state claims in the state courts, their "initial forum of choice" had to be the state courts, not the federal courts. Hence, the Second Circuit held that the *England* reservation was ineffective.

25. Finally, the Second Circuit abstained from discussing the jurisdictional consequences of the *Pullman* abstention order. Nor did the Second Circuit address the fact that the New York Court of Appeals decision, using federal standards to resolve the state constitution claims, could not have been reviewed by this Court. But, notably, as to the reviewability of its own collateral estoppel decision the court stated:

> [T]he district court made a determination of federal law – namely, that the issues decided and the standards applied by the New York courts are the same as those that would be dispositive under the First Amendment. If the district court's interpretation of the governing First Amendment standards were mistaken, and if this Court were mistaken in affirming the district court's interpretation of federal law, the Supreme Court would remain free to so find and to order this case to proceed in district court. (A-29).

REASONS FOR GRANTING THE WRIT

The Second Circuit has superimposed the federal collateral estoppel doctrine (28 U.S.C. § 1738) on top of a federal *Pullman* abstention order, without regard for the First Amendment consequences. The results are conflict, confusion and unfairness in the administration and development of First Amendment free speech jurisprudence. As this Court warned in *Montana v. United States*, 440 U.S. 147, 163 (1979), "Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical."

1. The Second Circuit's use of collateral estoppel to override federal jurisdictional and abstention doctrines poses critical problems in the administration of "Our Judicial Federalism."

The odd feature of the Second Circuit's opinion is its failure to mention or discuss the jurisdictional consequences of the *Pullman* abstention order entered by the federal district court in this case. This becomes a blind application of the federal collateral estoppel doctrine, without regard to its jurisdictional underpinnings and requirements. This is such a serious departure from "the accepted and usual course of judicial proceedings" by a lower federal court as to call for "an exercise of this Court's supervisory power." Rule 10(a) of this Court's Rules.

a. The nature of a *Pullman* abstention order

Pullman abstention is an important part of "Our Judicial Federalism," defined as "a flexible and dynamic accommodation of the sometimes conflicting interests of the state and federal courts." Justice O'Connor, *Our Judicial Federalism*, 35 CASE WESTERN RESERVE L. REV. 1, 12 (1984). Stemming

from this Court's decision in *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), *Pullman* abstention mandates that a federal trial court (1) abstain from deciding a federal constitutional issue but (2) retain its federal jurisdiction over that issue until the parties have had an opportunity to obtain from the state courts a ruling on the state issues at stake. If the state courts reject the state claims, the case returns to federal court for decision on the federal claim. As a result, *Pullman* abstention accommodates the competing constitutional and jurisdictional interests of the federal and state courts. *See* WRIGHT, LAW OF FEDERAL COURTS, § 52, p. 324 (5th ed. 1994).

Thus, as in this case, the *Pullman* order can be viewed as a jurisdiction-dispensing device. The order retained federal jurisdiction over the First Amendment claim, and it remanded to the state courts their jurisdiction over state constitutional matters only. As a result, the state courts possessed no jurisdiction over the First Amendment claim. Consider, then, the following questions raised but not answered by the Second Circuit's preclusive treatment of the state court rulings:

b. The jurisdictional questions

First Question: Must the rulings that are to be given preclusive effect be those of a court possessing jurisdiction over the matters at issue?

An affirmative answer is obvious. As Justice Jackson once wrote: "Of course, if a tribunal has not jurisdiction to render a judgment valid by the tests of due process, it is without validity at home and is entitled to no credit abroad. To give conclusive effect to such a judgment would itself be a denial of due process." Justice Jackson, *Full Faith and*

Credit – The Lawyer's Clause of the Constitution, 45 COL. L. REV. 1, 8 (1945).[8]

By giving preclusive effect to the state courts' use or borrowing of the federal constitutional standards relative to this kind of zoning ordinance, the Second Circuit leaves unanswered the basic jurisdictional question. Where, in light of the *Pullman* order, did the state courts acquire any federal jurisdiction to address, let alone resolve, the First Amendment claim?

Given its silence on the matter, the Second Circuit must have assumed that the federal references in the opinions of the state courts somehow reinvested the state courts with jurisdiction to resolve the First Amendment issues. But that cannot be. Borrowing federal standards is not a jurisdictional event. Nor can such borrowing overrule the jurisdictional limitations expressed in the *Pullman* abstention order.

Indeed, upon the *Pullman* remand the Petitioners made doubly sure that the federal issues would not be addressed in the state courts. In their *England* reservation, Petitioners advised the state courts that they reserved the right to litigate their First Amendment claim "in the federal court system," and that they were submitting to the state court system "only those causes of action arising under the New York State Constitution" (J.A. 309-310).[9]

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[8] See also Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 18 (1942): "Where the court has no jurisdiction to determine the cause of action which is the subject of the suit, its judgment is void."

[9] The Second Circuit sought to deprecate the importance of the *England* reservation that Petitioners filed in the state court after the *Pullman* remand order. The court opined that such a reservation is available "only to litigants who have sought to proceed in federal court in the first instance, and not to litigants such as the instant [Petitioners] who chose to file suit in the state court." (A-25).

But filing or not filing an *England* reservation has nothing to do with the problem of whether the state courts had jurisdiction to resolve the

(Footnote Continued on Following Page)

The Second Circuit's opinion offers no answer to this critical jurisdictional question. But the question itself deserves plenary consideration by this Court, especially since it arises in the context of a First Amendment free speech claim. And without such a review by this Court, the careful balancing of federal and state judicial power embodied in the *Pullman* abstention doctrine may be permanently harmed.

Second Question: Can the First Amendment claimants be said to have had "a full and fair opportunity to litigate" the First Amendment issues in the state courts, which had no jurisdiction to resolve those issues?

The Second Circuit's answer is that the New York state courts' rejection of Petitioners' state constitutional claims, using the same facts, issues and analyses that would be utilized in resolving the federal claim, afforded Petitioners "a full and fair opportunity to litigate the [First Amendment] issues" in the state courts. (A-22). Therefore, says the Second Circuit, the federal estoppel doctrine "prevents a federal court from revisiting the same issues that were decided against [Petitioners] by the New York state courts." (A-9).

There are several problems created by that analysis. Where were the Petitioners or the Respondents given any fair notice that the First Amendment claim would be at issue in the state court proceedings following the *Pullman* order? The *Pullman* order itself announced that the case was being remanded to the state courts on the grounds that (1) the state constitutional free speech protections might be broader than

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First Amendment issue, especially for preclusive purposes. Such a reservation is not a jurisdictional event. It merely confirms what the *Pullman* order directed -- that only the state free speech issues were to be decided by the state courts. The *England* reservation merely advised the state courts that only the state issues would be addressed by Petitioners. Indeed, this Court's opinion in *England* stated that such an explicit reservation is not "indispensable" and that in no event can the litigant's "right to return" to the federal court be denied. *England*, at 421.

the First Amendment's protections, although that was "far from clear", and (2) the state courts should be given the first opportunity to construe any ambiguities in the new zoning ordinance. (A-77-78). But combined with its retention of federal jurisdiction over the First Amendment claim, the *Pullman* order cannot be a notification that the First Amendment issue would be on trial before the state courts.

Indeed, the whole notion that Petitioners had such "a full and fair opportunity" to litigate the federal issues in the state courts comes as an afterthought on the Second Circuit's part. Only after the state court litigation was ended did the federal courts belatedly discover that the state courts, in finding no violation of state free speech law, had used the same facts and standards as would be used in First Amendment analysis.

Here, of course, Petitioners vigorously contend that the issues are not identical "when the standards governing them are significantly different." *See Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir. 1987). Since the federal and state constitutional standards for judging a zoning ordinance that affects free speech differ, there is no identity of issues. Thus, collateral estoppel is inapplicable.

Part of the analytic problem here may lie in the fact that had the federal district court foreseen that the state free speech doctrine mirrors the First Amendment free speech doctrine, it would not have issued its *Pullman* abstention order. It is well settled that if "the state constitutional provision is the mirror of the federal one" abstention is inappropriate. WRIGHT, LAW OF FEDERAL COURTS, § 52 p. 325 (5th ed. 1994), citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 n. 4 (1984); *Examining Board v. Flores de Otero*, 426 U.S. 572, 598 (1976).

In any event, this Court should clarify the meaning of the "full and fair opportunity" to litigate First Amendment issues in light of a *Pullman* abstention order. This Court has already recognized that: "Collateral estoppel does not apply where the party against whom an earlier court decision is asserted

did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Allen v. McCurry*, 449 U.S. 90, 101 (1980).

Third Question: Can a First Amendment free speech litigant be precluded from pursuing that federal claim in a federal court where the earlier state court reliance on, or borrowing of, the federal free speech standards is not appealable to this Court?

It is elementary preclusion law that "Relitigation of an issue is not precluded if the party against whom issue preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." 18 MOORE'S FEDERAL PRACTICE, § 132.03[4][k][i] (3d ed. 1998). And so we must ask, in this case, whether the decision of the New York Court of Appeals (the highest state court) could be subject to review by this Court on certiorari.

Even if we assume that the free speech provision of the New York State Constitution closely mirrors the First Amendment provision, which we dispute, it is difficult to read the New York decision as resting on anything other than adequate and independent state constitutional grounds. Cf. *Michigan v. Long*, 463 U.S. 1032 (1983). That conclusion is particularly compelling in view of the jurisdictional heritage of this case, wherein (1) the *Pullman* order had remanded only the state claims to the state courts, and (2) all parties and all the state courts proceeded on the assumption that only the state issues were on trial.

If the state court decision is truly based on state grounds, this Court would have no jurisdiction to review it. *See* STERN, GRESSMAN, SHAPIRO AND GELLER, SUPREME COURT PRACTICE, § 3.23, pp. 147-152 (7th ed. 1993). And to the extent that the state courts may have used or commented on the federal First Amendment standards in resolving the state issues, the jurisdictional inability of this Court to review such usage or comments further deprives these state court rulings

of preclusive effect. Certiorari should be granted to make that point clear.

2. The Second Circuit's decision raises critical problems as to the procedural "rights" of First Amendment free speech claimants.

By imposing the federal preclusion doctrine in this case, the Second Circuit has created serious problems in several procedural areas of First Amendment jurisprudence.

1. This Court has already established the "right" of First Amendment litigants "to return to the [Federal] District Court, after obtaining the authoritative state court construction for which the court abstained, for a final adjudication of [the federal] claim." *N.A.A.C.P. v. Button*, 371 U.S. 415, 427 (1963).

But the Second Circuit has effectively destroyed that "right" by holding that the state courts had already adjudicated the federal claim, unbeknownst to the parties or the state courts. The time is ripe for this Court to end such a "Catch-22" proposition. As some of the Circuits have recognized, the traditional rules of res judicata and collateral estoppel "do not apply to state court proceedings that follow *Pullman* abstention and an *England* reservation." *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 822 (3d Cir. 1994).[10] And the Ninth Circuit has observed that, following the entry of a *Pullman* order, it is "meaningless to retain [federal] jurisdiction just to rule at a

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[10] The Third Circuit cited the Eleventh Circuit decision in *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1302 n.1, 1306 (11th Cir. 1992) (*Pullman/England* situation is an exception to full faith and credit requirements). Also cited was the Third Circuit's own prior decision in *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1072 (3d Cir. 1990) (claim preclusion does not apply to state court proceedings when proper *England* reservation made).

later date that [the federal claimant] never had any right to return to federal court" to litigate the federal issues.

Such a Circuit conflict adds to the appropriateness of granting certiorari in this case.

2. Petitioners have also been deprived of the benefit of what this Court has described as an "obligation" of the federal courts to "make an independent examination of the whole record" in free speech cases to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984), quoting from *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964). As this Court added in *Montana v. United States*, 440 U.S. at 163, the abstention doctrine "may not serve as a vehicle for depriving individuals of an otherwise cognizable right to have federal courts make factual determinations essential to the resolution of federal questions."

The question here is whether a federal court's agreement with a state court's summary judgment determination – that the ordinance does not violate a similar or identical state constitutional free speech provision – can do service for a federal court's obligation to make independent fact findings in a First Amendment free speech case. That question has never been answered by this Court, and must be answered.

What it all comes down to is this: is a federal court obliged to make its own independent factual determinations concerning what is protected by the First Amendment. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Bose Corp. v. Consumers' Union of United States, Inc.*, 466 U.S. 485 (in cases raising First Amendment issues, an appellate court has an obligation to make an independent examination of the whole record to ensure that the judgment does not constitute a forbidden infringement on free expression). Or, are federal courts bound by the findings of a state court where there is a plausible claim that the standards are significantly different?

3. The Second Circuit's use of the collateral estoppel doctrine makes it impossible for First Amendment claimants to urge that federal free speech standards be changed or reconsidered.

There is a great anomaly in this case. The state courts, in resolving the state constitutional claims, are said to have addressed the same issues and applied the same standards as those that would be dispositive under the First Amendment.[11] Those federal issues and those federal standards were created and developed by this Court in its 1986 decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41.

The anomaly lies in the fact that the Petitioners are now collaterally estopped from urging that any of the *Renton* standards be refined, or reconsidered, or changed in any degree in light of the unique facts of this case, or in light of any changing community mores. Obviously, the state courts' borrowing and adoption of federal free speech standards, in the course of resolving the state issues, did not make a proper venue for urging or effecting any changes in the *Renton* standards. Moreover, under the *Pullman* abstention order, the state courts had no jurisdiction even to consider any changes in the federal *Renton* standards. And when the case returned to the federal judiciary for resolution of the First Amendment claim, the response was to rubber-stamp the state court's use of the *Renton* standards in resolving the state claims.

The result is that the Petitioners had no opportunity in either the state or the federal courts to urge that any of the *Renton* standards be updated or changed or reinterpreted in any way with respect to their application to New York City, which is composed of five quite different counties. And, the state courts had no jurisdiction to consider such changes. The federal courts were precluded from considering such changes.

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[11] Petitioners vigorously contested this in the courts below.

The *Renton* standards are meant to operate in all parts of the nation, not just New York City or not just the City of Renton. And if state courts wish to borrow them in construing their own constitutional problems, they are free to do so. But perceived difficulties with a federal constitutional rule as it operates nationwide may lead to modification or abandonment. See Louis D. Bilionis, *On the Significance of Constitutional Spirit,* 70 N.CAR. L.REV. 1803, 1809 (1992). Such a modification must be done by a court whose judgment on such a constitutional rule change is ultimately subject to review by this Court. That cannot happen in this case. The state courts had no jurisdiction to consider such changes; and the federal courts are estopped from entertaining or effecting changes, or even considering compliance with existing rules.

Thus we have a prime example of what this Court feared might happen: "[An] unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues [that] could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana v. United States,* 440 U.S. at 163.

Nowhere is that kind of "frozen" doctrine more evident in this case than with respect to the critical *Renton* standard: that the zoning or rezoning of adult establishments must "allow[] for reasonable alternative avenues of communication." *Id.* at 50.

But as the Ninth Circuit has recognized, this Court "has not stated what sort of factors may be considered when deciding whether the relocation sites provided by a city are reasonable." *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1529 (9th Cir. 1993). The Ninth Circuit also recognized that some Circuits, in dealing with the "reasonableness" component of the *Renton* standard, have tried to draw a distinction between (1) "economically unsuitable land," and (2) "physically or practically unsuitable land." *Id.* But such a distinction has proved unworkable. That

led the Ninth Circuit to create a reasonableness standard in terms of whether it is unreasonable to believe that [a designated relocation site] would ever become available to any commercial enterprise." *Id.* at 1531.

The First Amendment problem here is to create a standard of reasonableness in light of the nature and accessibility of the designated relocation areas among the five boroughs of New York City. And any designated "alternative site" is reasonable only if the location is commercially viable as well as readily accessible to the public.

But the relocation areas designated by the City in the state court proceedings cannot be considered reasonable by any standard. Most of the proposed sites are located in remote and destitute areas of the City. We have attached to the Appendix, (A-87-91) photographs from each borough of relocation areas designated by the City as permissible for adult businesses. These representative photographs show, in shocking detail, how "unreasonable" the designated areas are for any kind of business, and how dangerous is the public access to such locations.

These pictures, together with more than fifty others introduced in the courts below, show dump sites of drums containing hazardous waste, oil tank fields, marshes and wetlands, unimproved and closed roads, unpassable sidewalks, walls of concrete boulders, flooded lots, recycling transfer stations, Department of Sanitation buildings, concrete plants, UPS complexes, city fire department buildings, U.S. Customs warehouses, and a parking lot for the New York Aquarium. Most of these sites are not readily accessible, even by subway or bus. And walking or driving to these remote spots would be hazardous in the extreme.

Out of such deserted areas, many of which are not for sale or rent, some federal court and ultimately this Court must determine whether New York City has met the

"reasonableness" part of the *Renton* constitutional standards. No decision of this Court has answered this problem.

4. The radical requirement that 84% of all pre-existing adult businesses must either close or relocate to remote areas of the City violates the First Amendment because such a large scale suppression of free speech is in direct conflict with *Young v. American Mini Theaters, Inc.*

Admissions by the City that there will be significantly fewer adult businesses once the Zoning Resolution is enforced have proven true since enforcement proceedings were commenced on July 22, 1998.[12] Criminal summonses have been issued to the owners of bookstores and approximately 30 establishments have already been subject to padlock proceedings.[13] There is a serious federal constitutional issue concerning the degree to which protected speech can be so *radically* eliminated to satisfy a city's zoning needs. The drastic, and unprecedented, elimination of 84% of a form of protected speech violates the First Amendment. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 62 n. 35 (1976)(holding that a zoning ordinance cannot reduce the number of adult businesses); *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 71 (1981).

In the current case, admissions from Defendant Giuliani that the end result will be dramatically fewer adult businesses in the city demonstrate vividly that the total number of adult uses will drastically decline and the public will be denied access to constitutionally protected expression. This clearly violates the Petitioners' rights of free expression under the First Amendment.

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[12] Defendant Mayor Giuliani, at a press conference held on February 24, 1998, announced that: "the places [adult businesses] can relocate are *severely limited* ...[the Zoning Resolution] will reduce the number in the City to something like 20 or 30" (J.A. 914).

[13] CHRISTIAN SCIENCE MONITOR, Sept. 29, 1998 at 3 (21 of the businesses closed their doors and the City has tried to shutter another 29).

The current case is noticeably distinguishable from this Court's decisions in *Renton* and *Young*, in that neither of those cases addressed the issue of pre-existing businesses. In *Young*, *all* existing adult establishments were allowed to remain in place under a grandfather provision. There, the ordinance affected only new establishments entering the marketplace. As a consequence, the impact on free speech was minimal. In *Renton*, there were no adult establishments in the municipality at the time of the enactment of the zoning resolution. Thus, it had only a prospective effect. The resolution at issue, in contrast, will *eliminate* at least 84% of the adult entertainment industry in New York City and affect approximately 150 adult theaters and bookstores throughout the city.

The call to reconsider *Renton* from both members of this Court, other circuit courts and scholars continues unabated. The need for the amplification of the guidelines for "alternative avenues of communication" counsels against further delay and this case is an excellent vehicle for such a reexamination. Thus, the inherent importance of the questions presented by this petition, combined with the substantial impact the answers will have on the exercise of free speech warrants a full review of the case by the Court.

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States
Court of Appeals Filed
July 13 1998
Carolyn Clark Campbell,
Clerk
Second Circuit

Carolyn Clark Campbell
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of July one thousand nine hundred and ninety-eight.

AMSTERDAM VIDEO INC., et al.,

Plaintiffs-Appellants,

v. Dkt No.: 98-7270

THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Plaintiffs-Appellants Amsterdam Video Inc., et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: /s/ Beth J. Meador

Beth J. Meador,

Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997

Argued: April 29, 1998
Decided: June 3, 1998

Docket Nos. 98-7269, -7270

United States
Court of Appeals
Filed Jun 3, 1998
George Lange III, Clerk
Second Circuit

Rachel Hickerson, Derek Jones, Ty McConnell, and Elliot Stamler,

Plaintiffs-Appellants,

Amsterdam Video Inc., A & X Entertainment Inc., d/b/a Playpen II, Adult Video, Inc., Ascot Space Amusement, Inc., d/b/a Ascot Theatre, Big Apple Cinemas Inc., d/b/a Show Follies Theater, Brett Distributors, Inc., d/b/a Media Distributors, Capri Cinema Inc., Capwell Entertainment, Inc., d/b/a Legz Diamond's Playhouse, Church Street Cafe Inc., d/b/a Baby Doll Lounge, College Pt. Rest. Corp., d/b/a Gallagher's II, Crazy Fantasy Video, Inc., Cupid's Treasures, Inc., d/b/a Banana Video and Unicorn, Dara Distributors Inc., d/b/a Love Shack, Desire Video Inc., E & A Books, Inc., E & A Video and Magazine Inc., Ed-Mart Bar & Grill Inc., d/b/a Penny Whistle, For the People Theatres of N.Y., Inc., d/b/a Fair Theatre, Four Keys Enterprises, Inc., d/b/a Hollywood Peepshows, Fourteenth St. Enterprises Inc., d/b/a All Male Adult Video, Fun City Video Corp., G & D Merchandise Corp., d/b/a Peepland, Gotham Exhibitor Inc., d/b/a Peep O Rama, Helen Wolff Ltd., d/b/a Come Again, I.S. Sultars Inc., J & J Tummy Yummies Corp., d/b/a Naked City, JGJ Merchandise Corp., d/b/a Peepland/Valentina's II, JHM Video Corp.,

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JUM Operating Corp., d/b/a Peepland, JVR Video Center Inc., d/b/a Playground, Kinematics Merchandising & Distributors, Inc., d/b/a Kinematics, Kisma Video, Inc., L & T Video, Inc., d/b/a Badlands Adult Video, Madeline D'Anthony Ent. Inc., d/b/a Harmony Theatre, Manhattan Video Inc., Marquis Video Inc., d/b/a Marquis Video, Mirage Productions Inc., d/b/a Love Shack, Montana Holdings Inc., d/b/a Runway 69, Nawan Entertainment Inc., d/b/a Euro World, Nilupul Video Inc., N.R.S. Video Inc., NY Video Inc., d/b/a Love Shack, Pabon Theatre Corp., d/b/a Eros Theatre, Peregrine Enterprises, Inc., d/b/a Paradise Club, R.E.J.M., Inc., d/b/a Big Top, Ron Bob Pub Inc., d/b/a Gallagher's, Sami's Video Warehouse, d/b/a Warehouse on the Block, LTD, Serendib Video Inc., d/b/a Serendib Video, SPH Video Corp., Star Distributors, LTD, Statewide Video Inc., Steam Heat Inc., STS Video Inc., d/b/a Adult Video, Suemar Video, Inc., d/b/a Goodtime Video, Third Avenue Entertainment Inc., d/b/a XXX Video, Thunder Video Inc., Town Video Sales, Inc., d/b/a Les Hommes Book Shop, Video, Video, Video, Inc., Video 30 of Queens Inc., d/b/a Ecsxxxtasy Video, West Video Inc., Zideo Video Inc., 21 Ann Street Corp., d/b/a Ann Street Adult Entertainment, 130 C Street Corp., d/b/a Christopher Street Book Shop, 155 Video Center Corp., d/b/a Peepworld, 300 Book Center, 303 W. 42nd Street Enterprises Inc., d/b/a Show World, 323 Canal St. Inc., 325 W. 45th St. Rest. Corp., d/b/a Private Eyes, 35-30 38th St. Corp., d/b/a Cityscape, 412 8th Ave. Corp., d/b/a Nude New York City, 45-08 Vernon Blvd. Corp., d/b/a Riverhead Inn, 603 Video Inc., 610 Video Store Inc., 691 8th Avenue Corp., 691 Video Center Corp., 693 Video Corp., d/b/a TNL Video, 711 Associates Ltd., d/b/a Peepland, 729 6th Avenue Corp., d/b/a Billy's Topless, 733A Corp., d/b/a Video Palace, 763 Video Store Inc.,

777-779 8th Ave. Corp., d/b/a Hollywood Twin, 81-22 Baxter Ave. Lounge Inc., d/b/a ILDA's Place II,

Plaintiffs Appellants.

v.

The City of New York, Hon. Rudolph W. Giuliani, as Mayor of the City of New York, Joseph B. Rose, as Director of City Planning, Department of City Planning of the City of New York, and Gaston Silva, as Commissioner of Buildings, Department of Buildings of the City of New York,

Defendants-Appellees,

Times Square Business Improvement District, Center for the Community Interest, Bellaire/Bell-Vill Civic Association, Bnos Israel Girls' School, Bowne Park Civic Association, Briarwood Community Association, Bronx Community Board # 12, Brooklyn Civil Council, Brooklyn Tenants Council, Cardinal Spellman High School, Coalition of United Residents for a Safer Environment, College Point Board of Trade, Committee for a Better and Safer Nostrand Avenue, Communities of Masbeth and Elmhurst Together, Community School District 21 Presidents' Council, Congregation Bnai Shloima Zalman, Crown Heights Taxpayers and Civic Association, Douglaston Civic Association, East Midwood Neighborhood Association, Councilmember Andrew Eristoff, Grand Central Partnership, Holliswood Civic Association, Hudde Junior High School Parents Association, Jackson Heights Community Development Corporation, Kings Highway District Management Association, Kingsway Jewish Center; Lawyers' Committee on Violence, Manhattan Terrace Civic Association,Councilmember Helen Marshall, Midwood Civic Action Council Inc., New Northern Boulevard

Business Association, Northern Boulevard Merchants' Association, 100-299 East 77th Street Block Association, Prospect Park Yeshiva, Queens Braddock Civic Association, Queens Village Civic Association, Real Estate Board of New York, Residents Against Street Prostitution, Rosedale Block Association, Rosedale Civic Association, Councilmember John Sabini, 34th Street Partnership, United Civic Council of Queens, United Community Civic Association, Councilmember Anthony Weiner, West 45th Street Block Association, West 47th/West 48th Street Block Association and West 90's/West 100's Neighborhood Coalition,

Defendants-Respondents-Intervenors-Appellees.

Before: VAN GRAAFEILAND, MESKILL, and CABRANES, Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*) denying plaintiffs' motion for a temporary restraining order and preliminary injunction to stay the enforcement of an amendment to the Zoning Resolution of the City of New York that regulates the zoning of "adult establishment[s]." The district court concluded that plaintiffs were collaterally estopped from relitigating in federal court the same issues that were decided against them in the prior litigation of their state constitutional claims in state court.

Affirmed.

Herald Price Fahringer, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP, New York City (Erica T. Dubno, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP; J. Michael Murray, Berkman, Gordon, Murray & DeVan, of counsel), for Plaintiffs-Appellants Amsterdam Video, Inc., et al.

Beth Haroules, New York Civil Liberties Union Foundation, New York City (Arthur N. Eisenberg, Norman Siegel, New York Civil Liberties Union Foundation, of counsel), for Plaintiffs-Appellants Rachel Hickerson, et al.

Leonard J. Koerner, Office of the Corporation Counsel of the City of New York, New York City (Michael D. Hess, Corporation Counsel of the City of New York, Gabriel Taussig, Elizabeth S. Natrella, of counsel), for Defendants-Appellees.

Frederick A.O. Schwarz, Jr., Cravath, Swaine & Moore, New York City, for Defendant-Respondent-Intervenor-Appellee Times Square Business Improvement District.

Wayne A. Cross, Dewey Ballantine LLP, New York City, for Defendants-Respondents-Intervenors-Appellees Center for the Community Interest, et al.

JOSE A. CABRANES, Circuit Judge :

This case concerns an amendment to the Zoning Resolution of the City of New York (the "Zoning Amendment") regulating the zoning of "adult establishment[s]," as defined by the Zoning Amendment. The principal provisions of the Zoning Amendment limit the permissible locations of adult establishments to non-residential districts[1] and require that they be located – within

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[1] Even prior to the passage of the Zoning Amendment, New York City's Zoning Resolution prohibited new commercial development in residentially zoned districts. Under the Zoning Amendment, adult establishments are also barred from certain districts that are zoned for

the districts in which they are permitted – at least 500 feet away from any school, day care center, or house of worship; at least 500 feet from excluded districts; and at least 500 feet from one another. Plaintiffs in these consolidated cases are patrons and owners of adult establishments within New York City who claim that the Zoning Amendment violates their rights to free expression under Article I, § 8 of the New York State Constitution and the First Amendment of the United States Constitution. In a case involving a different set of plaintiffs, we recently upheld the Zoning Amendment against facial federal constitutional challenges under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *See Buzzetti v. City of New York*, 140 F.3d 134, 1998 WL 130866 (2d Cir. Mar.20, 1998).

The factual background of the Zoning Amendment is detailed both in *Buzzetti* and in prior state and federal decisions arising from the instant litigation, with which we assume familiarity. *See Hickerson v. City of New York*, __ F.Supp. __, 1998 WL 105583 (S.D.N.Y. Mar. 6, 1998); *Hickerson v. City of New York*, 932 F.Supp. 550 (S.D.N.Y.1996); *Stringfellow's of New York, Ltd. v. City of New York*, 171 Misc.2d 376, 653 N.Y.S.2d 801 (N.Y.Sup.Ct.1996), *aff'd*, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, 91 N.Y.2d 382, 1998 WL 77749 (N.Y. Feb. 24, 1998). The instant appeal is from an order of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*), dated March 6, 1998, which denied plaintiffs' motion for a temporary restraining order and a preliminary injunction to stay the enforcement of the Zoning Amendment.[2] Although

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commercial and manufacturing uses, but that permit new residential development as well.

[2] During the prior state-court proceedings, the enforcement of the Zoning Amendment was stayed by court order. The stay was terminated by Judge Cedarbaum's March 6, 1998 order denying plaintiffs' application for a preliminary injunction. Judge Cedarbaum stayed her order until March 11, 1998, to allow plaintiffs to seek a stay in this Court. Judge Walker extended the stay to March 11, 1998 so that the issue could

at the heart of this litigation is a controversy over free expression, plaintiffs have already presented their free-speech claims to the New York courts. The only question before us is whether the New York courts' rejection of plaintiffs' state constitutional claims forecloses plaintiffs from relitigating, in the form of a First Amendment claim in federal court, the same issues that were resolved against them in state court. We agree with the district court that the "full faith and credit" statute prevents a federal court from revisiting the same issues that were decided against plaintiffs by the New York state courts, which provided plaintiffs with a full and fair opportunity to litigate these issues. Accordingly, we affirm.

I.

We review the district court's denial of a preliminary injunction for an abuse of discretion. *See Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir.1996). "It is by this time black-letter law that the party seeking a preliminary injunction must establish that: (1) absent injunctive relief, it will suffer an irreparable injury; and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tips in favor of the movant." *Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo, S.A.*, __ F.3d __, 1998 WL 220954, at *9 (2d Cir. May 6, 1998). "Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction." *Bery*, 97 F.3d at 693. Because we conclude, however, that plaintiffs are collaterally estopped from relitigating the issues that govern their First Amendment claim, they can show neither "a likelihood of

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be considered by a three-judge panel, and the panel ordered the appeal to be expedited and extended the stay through the hearing of the expedited appeal. At oral argument of this expedited appeal on April 29, 1998, we extended the stay until further order of this Court.

success on the merits" nor "sufficiently serious questions going to the merits to make them a fair ground for litigation."

Under the full faith and credit statute, 28 U.S.C. § 1738,[3] "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) (noting that § 1738 "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims"); *see generally Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) ("A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ....") (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 42 L.Ed. 355 (1897) (ellipses in original)). New York law provides that an issue may not be relitigated if the identical issue was necessarily decided in a previous proceeding, provided that the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior action. *See, e.g., In re Sokol*, 113 F.3d 303, 306 (2d Cir.1997); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500-01, 478 N.Y.S.2d 823, 826-27, 467 N.E.2d 487, 490-91 (1984).

We agree with the district court that the issues decided and the standards applied by the New York state courts in rejecting plaintiffs' state constitutional challenge are the

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[3] 28 U.S.C. § 1738 provides, in pertinent part, that state court determinations "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken."

same that would be applicable to plaintiffs' First Amendment claim. Under both the federal and state Constitutions, the Zoning Amendment must: (1) be "content neutral," in the sense that it is aimed not at the restricted speech itself but at the negative secondary consequences that flow from it; (2) serve substantial government interests and be no broader than necessary to serve these interests; and (3) leave open reasonable alternative avenues of communication. *Compare City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), *with Stringfellow's of New York, Ltd. v. City of New York*, 91 N.Y.2d 382, 1998 WL 77749, at *5 (N.Y. Feb. 24, 1998). The New York Court of Appeals unanimously held that the Zoning Amendment met these standards – just as this Court in *Buzzetti* found the Zoning Amendment constitutionally unobjectionable on the record then before us – and this determination is equally dispositive of plaintiffs' claim under the First Amendment. *Cf. Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 479-80, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) (holding, in Title VII case, that "[a]lthough the claims presented to the NYHRD [New York State Division of Human Rights] and subsequently reviewed by the Appellate Division were necessarily based on New York law, the alleged discriminatory acts are prohibited by both federal and state laws. The elements of a successful employment discrimination claim are virtually identical; petitioner could not succeed on a Title VII claim consistently with the judgment of the NYHRD that there is no reason to believe he was terminated or not rehired because of age or religion. The Appellate Division's affirmance of the NYHRD's dismissal necessarily decided that petitioner's claim under New York law was meritless, and thus it also decided that a Title VII claim arising from the same events would be equally meritless." (footnotes omitted)).

Plaintiffs do not deny that the state and federal standards are nominally the same in all material respects, but rather argue that the standards are applied differently in state and federal court. In particular, plaintiffs contend that federal

courts require greater proof from municipalities that the non-speech-related government interests at stake are substantial and that reasonable alternative avenues of communication remain available. We note that this contention is in stark contrast to plaintiffs' repeated assertions in earlier stages of this litigation that New York courts apply more favorable standards to their free-speech claims than federal courts. In any event, apart from their recent vintage, plaintiffs' arguments are mistaken.

A. Substantial Government Interests

With respect to the substantiality of New York's non-speech-related interests in the Zoning Amendment, the New York Court of Appeals observed that "the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City." *Stringfellow's*, 91 N.Y.2d at __ 1998 WL 77749, at *6. The court then reviewed in detail this legislative record, which included studies by the Times Square Business Improvement District, the Chelsea Action Coalition and Manhattan Community Board 4, and the Department of City Planning ("DCP"). Each of these studies linked the presence of adult establishments to increased crime and decreased property values. *See id.* at *6-7.[4] The court also noted that, apart from the City's own studies, the legislative record contained the conclusions of studies conducted by city councils and town boards

[4] Although plaintiffs argue on appeal that the DCP's own study suggests no correlation between adult establishments and the negative secondary effects identified by the City, the New York Court of Appeals took account of, and rejected, this very argument, observing that "[a]lthough the DCP acknowledged that its analysis of the hard data regarding the relationship between adult uses and urban ills did not yield conclusive results, a reading of its report as a whole indicates that the negative perception of adult enterprises held by the business community and the public itself results in disinvestment, with the concomitant deterioration in the social and economic well-being of the surrounding area." *Id.* at *7.

throughout the country, which also showed a correlation between adult establishments and negative secondary effects such as increased crime, depressed real estate markets, and an overall decline in the quality and character of surrounding neighborhoods. *See id.* Finally, the court rejected plaintiffs' complaints about the sufficiency of the evidence, holding that it was entirely appropriate to rely on studies from other jurisdictions – particularly in light of the fact that City officials had considered the comparability and reliability of these studies – and that the "non-empirical" nature of some of the City's evidence (*i.e.*, from surveys of businesses and real-estate brokers) did not render it valueless or insubstantial. *See id.* at *8.

Plaintiffs now raise the same objections to the City's evidence that were rejected by the New York Court of Appeals, and despite that court's thorough review and analysis of the legislative record, plaintiffs claim that federal law requires the City to provide greater evidence of negative secondary effects than the New York courts required. Accordingly, plaintiffs contend that they are not estopped from relitigating the sufficiency of the City's evidence under this allegedly more stringent federal standard. In arguing that a more stringent standard exists, plaintiffs rely almost exclusively on *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir.1997) (en banc), a case that provides no support whatsoever for their position. *Phillips* was an adult-use zoning case in which the Third Circuit required additional evidentiary support for a zoning ordinance that had been upheld by the district court "(1) without an answer from the defendants identifying the secondary effects alleged to justify the burden on expression, and (2) without a record supporting the reasonableness of any legislative expectations regarding the likelihood of these secondary effects and the ameliorative effect of the ordinance." *Id.* at 173. The Third Circuit noted that, whereas in *Renton* the Supreme Court had considered the City of Renton's legislative record to be adequate where it consisted solely of studies from other cities that could reasonably be deemed relevant, "[h]ere, the district court had

no way of knowing what problem or problems the Borough thought it was facing and there is no study or other evidence in the record concerning the secondary effects of 'adult entertainment uses.'" *Id.* at 174. In order to avoid "reduc[ing] the First Amendment to a charade in this area," *id.* at 175, the Third Circuit required the Borough at least to "identify" the secondary effects with some particularity, and to "offer some record support for the existence of those effects," *id.* Far from suggesting that federal law would require more exacting scrutiny of the legislative record than was undertaken by the New York courts in this case, *Phillips* stands for nothing more than the unremarkable proposition that a barren legislative record will not suffice under the First Amendment – a proposition which is unhelpful to plaintiffs, in light of the fact that the legislative record in the present case is quite extensive, as the state courts recognized.

In any event, quite apart from the fact that we find no merit in plaintiffs' argument that the federal standard for judging the substantiality of New York's non-speech-related interests is stricter than the state standard, this Court, in *Buzzetti*, has already considered and rejected the argument that the legislative record is inadequate, as a matter of federal law, to support the City's legitimate and substantial interests in the Zoning Amendment. As we stated in *Buzzetti*:

> *Renton* emphasized that city officials were not required to make particular findings regarding the secondary effects of adult entertainment in *Renton* itself, but rather were "entitled to rely on the experiences of ... other cities." *Renton*, 475 U.S. at 51, 106 S.Ct. at 931; *see id.* at 51-52, 106 S.Ct. at 931 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."). Thus, New York City's reliance on studies from a variety of other areas of the country was well-placed.

> But ... New York City went beyond this minimal requirement: the DCP conducted its own detailed study, consulted other studies conducted in particular neighborhoods of New York City, and considered testimony given at public hearings in New York. __ F.3d at__,1998 WL 130866, at *7 (first ellipsis in original). Accordingly, it is clear that there is no basis for allowing plaintiffs to relitigate this issue in federal court.

B. Alternative Avenues of Communication

Plaintiffs' argument that federal courts apply a more stringent standard than the New York courts applied to determine whether there are "reasonable alternative avenues of communication" is also unavailing. Indeed, the New York Court of Appeals summarized the standard that federal courts have applied, and proceeded to apply that very standard as the basis for its inquiry under the state Constitution. The court's discussion merits quotation at length:

> Relying on a formula derived from *City of Renton v. Playtime Theatres*..., the federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads" (*id.*, at 53-54). Under *Renton*, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry (*see*, *City of Renton v. Playtime Theatres*, [475 U.S.] at 53; *Woodall v. City of El Paso*, 49 F.3d 1120, 1124-25 [(5th Cir.)], cert [.] denied [,] 516 U.S. 988, 116 S.Ct. 516, 133 L.Ed.2d 425 [(1995)]; *Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d 1068,

1070 [(5th Cir.1994)]; *see also, Town of Islip v. Caviglia*, [73 N.Y.2d 544,] 555, 560 [(1989)] (areas of a municipality set aside for adult uses need not be prime locations)). Rather, the inquiry is limited to the *physical* and *legal* availability of alternative sites within the municipality's borders and whether those sites are part of an actual business real estate market (*see, Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1530-31 [(9th Cir.1993)], cert [.] denied [,] 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190 [(1994)]; see also, *Woodall v. City of El Paso, supra*; *Alexander v. City of Minneapolis*, 928 F.2d 278 [(8th Cir.1991)].

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (*see* [*Topanga*], 989 F.2d, at 1531). Notably, these considerations dovetail nicely with Islip's requirement that there be "ample space available for adult uses after the rezoning" and no showing of a substantial reduction in the total number of adult outlets or the accessibility of those outlets to their potential patrons (73 N.Y.2d, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215). With these considerations as a backdrop, we turn now to the specific facts and contentions presented here.

Stringfellow's, 91 N.Y.2d at --, 1998 WL 77749, at *9-10.

Significantly, the two cases most heavily relied upon by plaintiffs in arguing that federal law imposes more of an evidentiary burden on the City to prove the availability and suitability of alternative sites than the New York state courts imposed – *Topanga Press, Inc. v. City of Los Angeles* and

Woodall v. City of El Paso – were cited and relied upon by the New York Court of Appeals. Forced to acknowledge this fact, which strongly suggests that the state court was not answering a different question or applying a standard less favorable to plaintiffs than federal courts would apply, plaintiffs argue that while "the New York Court of Appeals did refer to the *Topanga* and *Woodall* decisions[, a]nd ... did suggest that the City was obligated to demonstrate 'the physical and legal availability of alternative sites .... and whether those sites are part of the actual business real estate market[,]' ... there is a serious analytic gap between this language ... and the factual record developed in the state trial court." Brief of Hickerson Appellants at 31-32. Plaintiffs argue, in other words, that while the New York Court of Appeals purported to be making the same determination that a federal court would make under federal law to determine the availability of "reasonable alternative avenues of communication," plaintiffs should not be collaterally estopped from relitigating this issue because the "serious analytic gap" between the evidence and the recited standard belies any conclusion that federal standards were genuinely applied.

We find no such "serious analytic gap," nor any reason to doubt that the New York Court of Appeals answered the same question that would be dispositive under federal law. Plaintiffs' primary argument to the contrary is that federal law requires municipalities to identify the *specific* physically and legally available relocation sites. Plaintiffs have produced an affidavit from a land-use planning consultant, Robert McLaughlin (the "McLaughlin Affidavit" or "Affidavit"), which asserts that some of the land identified by the City as available for relocating adult establishments is not realistically available, for a variety of reasons–some of the land, for example, is allegedly occupied by "oil tank farms" and structures including "numerous and large facilities of the New York City Sanitation Department." McLaughlin Affidavit at 24, 26. Unless the City can precisely identify the "physically and legally available" sites to which the

approximately 147 adult establishments that will need to relocate can move, plaintiffs argue, the City has not carried its burden of proving that "reasonable alternative avenues of communication" exist under federal law.

Plaintiffs' argument suffers from several flaws. First, we are aware of no federal case, and plaintiffs direct our attention to none, that requires municipalities to identify the exact locations to which adult establishments may relocate, as opposed to identifying the general areas that remain available and proving that such areas contain enough potential relocation sites that are "physically and legally available" to accommodate the adult establishments. This is precisely the standard of proof to which the New York Court of Appeals held the City. Clearly then, to second-guess that court's determination of this issue would violate the full faith and credit statute.

After observing that "it is incumbent upon the municipal defendants to demonstrate that sufficient alternative receptor sites are available," *Stringfellow's*, 91 N.Y.2d at__, 1998 WL 77749, at *10, the New York Court of Appeals noted the City's evidence that, after excluding land identified by the City as being encumbered by properties unlikely to be developed for commercial use, 4% of the total land area of the City remained open to adult establishments. Maps prepared by the City reflected that, after factoring in the Zoning Amendment's 500-foot buffer zones, over 500 potential sites remained available. *See id.* Further, the New York Court of Appeals considered the City's evidence that the zoning districts left open to adult establishments "permit a wide mix of commercial, retail, entertainment and manufacturing uses," *id.*, and that all of these areas in Manhattan and 80% of the areas in the other boroughs of New York are within a ten-minute walk from a subway line or major bus route, *see id.*[5]

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[5] The accessibility of potential sites in the so-called "outer boroughs" disposes of plaintiffs' argument – which, in any event, is without foundation and unsupported by case law – that in contrast to the state

The court did not ignore plaintiffs' evidence – namely, the McLaughlin Affidavit – that portions of the 4% of "unencumbered" land identified by the City were not realistically available, but rather found this evidence insufficient to raise a material question of fact regarding the availability of "reasonable alternative avenues of communication." The court partially discredited the McLaughlin Affidavit because McLaughlin considered land to be "unavailable" that, under *Renton*, is not to be excluded – such as industrial areas, undeveloped land, and warehouse areas. *See Renton*, 475 U.S. at 53-54 (finding available land to be adequate where it included "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space," and observing that the fact that the establishments "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation"); *see also, e.g., Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d at 1069-70 (holding that adult-use zoning ordinance provided reasonable alternative avenues of communication even though 90% of prospective sites were on undeveloped land). The court also recognized that while the McLaughlin Affidavit identified, within the 4% of purportedly "unencumbered" land identified by the City, specific sites that were clearly not realistically available, this was insufficient to cast doubt upon the availability of "reasonable alternative avenues of communication" where the City had produced evidence showing that this land could accommodate over 500 establishments under the terms of the Zoning Amendment, approximately *three times* the number of establishments that currently exist:

> The most significant flaw in McLaughlin's affidavit ... is the absence of any attempt to quantify his observations or to make concrete allegations as to

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courts' analysis, the First Amendment requires proof of adequate available sites on a borough-by-borough basis.

> precisely how many of the 500 potential receptor sites identified by defendants were, in his estimate, unavailable.[6] To be sure, the affidavit lists a significant number of sites that are pragmatically unavailable because their current uses are so entrenched that they are unlikely to become part of the commercial real estate market in the foreseeable future. Included in this category are such diverse sites as those that house the northern half of Federal Plaza in Manhattan, the Clay Pit Ponds State Park Preserve in Staten Island, a New York City fire house in Brooklyn and a United Parcel Service facility in Queens. However, McLaughlin's criticisms about various individual sites do not provide an adequate counter to defendants' supported claim that within the available acreage as a whole there are more than enough receptor sites to accommodate the existing adult entertainment industry.

Stringfellow's, 91 N.Y.2d at__, 1998 WL 77749, at *11; *see also Stringfellow's*, 171 Misc.2d at 396, 653 N.Y.S.2d at 814 ("Even if the City's estimate overstates the number of potentially viable relocation sites, there still remains ample space for more than the existing numbers of adult establishments.... [N]othing in *Renton, Islip* or any existing case law requires the City to identify specific sites that are actually available."); *cf. Woodall v. City of El Paso*, 49 F.3d at 1126 (stating, in response to complaints by adult

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[6] McLaughlin subsequently did quantify, in a new but substantially similar affidavit submitted to the district court, the number of sites he considered to be realistically available (90). However, in light of our agreement with the district court that plaintiffs had a full and fair opportunity to present evidence in state court, *see infra*, this belated submission does not affect our collateral estoppel inquiry. "A party ... cannot avoid issue preclusion simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first." 18 James Wm. Moore, *et al., Moore's Federal Practice* § 132.02(2)(d), at 132- 26 (3d ed.1998); *see, e.g., Yamaha Corp. v. United States*, 961 F.2d 245, 254-55, 257 (D.C.Cir.1992), *cert. denied*, 506 U.S. 1078, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993).

establishments as to the viability of particular sites, that "even if we agreed that ... these sites suffered from defects so severe as to take them out of the commercial real estate market and render them physically unavailable, there was no evidence that surrounding sites suffered from the same impediments so as to render them likewise unavailable").

In sum, there is no reason to doubt that the New York Court of Appeals applied the same standard and answered the same questions that apply under federal law in determining whether the Zoning Amendment provided for "reasonable alternative avenues of communication." The argument that federal law would have required the City to identify the precise sites to which adult establishments could relocate is not only unsupported by any federal case law, but is belied by our recent decision in *Buzzetti*. In *Buzzetti*, far from suggesting that the City's evidence was inadequate because it was not site-specific, we held that "there can be no doubt on this record that the Zoning Amendment allows for reasonable alternative avenues of communication." 140 F.3d at__, 1998 WL 130866, at *8 (internal quotation marks omitted). Although we did not have the McLaughlin Affidavit before us in *Buzzetti*, the McLaughlin Affidavit is only relevant to whether plaintiffs have produced enough counter-evidence to cast doubt on the City's evidence, and it does not change the fact that under federal law the City was not required to identify precise relocation sites in order to prove the existence of "reasonable alternative avenues of communication." The state courts' determination that the McLaughlin Affidavit did not cast sufficient doubt on the City's evidence to preclude summary judgment–based largely on the Affidavit's failure to quantify the number of feasible sites, its reliance on premises that were invalid under *Renton*, and the persuasiveness of the City's own evidence – does not, in short, represent a departure from federal standards. The full faith and credit statute therefore bars plaintiffs from relitigating the issue of alternative sites in federal court.

C. Plaintiffs' Opportunity to Litigate the Issues in State Court

Collateral estoppel will only apply if plaintiffs had a "full and fair opportunity" in New York state court to litigate the issues that they now seek to relitigate in federal court. *See In re Sokol*, 113 F.3d at 306; Ryan, 62 N.Y.2d at 501, 478 N.Y.S.2d at 826, 467 N.E.2d at 490. Plaintiffs, as the parties opposing the application of collateral estoppel, bear the burden of proving that they were denied this full and fair opportunity. *See In re Sokol*, 113 F.3d at 306; *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 456, 492 N.Y.S.2d 584, 588, 482 N.E.2d 63, 67 (1985). Under New York law, "[a] determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of the realities of the [prior] litigation, including the context and other circumstances which ... may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him." *Ryan*, 62 N.Y.2d at 501, 478 N.Y.S.2d at 827, 467 N.E.2d at 491 (internal quotation marks and citation omitted; alterations in original). Included among the factors to be considered are "the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, [and] the competence and expertise of counsel." *Id.* Substantially for the reasons stated by Judge Cedarbaum, we believe that plaintiffs have not met their burden of proving that they were denied a full and fair opportunity to litigate their claims in state court. See *Hickerson*,__F.Supp. at__, 1998 WL 105583, at *5-6.

Accordingly, because the same issues decided by the state courts are dispositive of plaintiffs' claims under the First Amendment, and because plaintiffs had a full and fair opportunity to litigate these issues in state court, they are collaterally estopped from relitigating them in federal court.

II.

Plaintiffs argue that they are not precluded from litigating their First Amendment claim in federal court because they informed the state court, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), that they intended to reserve the right to litigate their federal claims in federal court. *England* held that, after a federal court has abstained under the doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), in order to obtain an authoritative interpretation of state law that could potentially moot or influence the federal constitutional questions presented, parties who have been remitted to state court against their will are not forced to litigate their federal claims there, but may reserve the right to a federal adjudication of these claims. See 375 U.S. at 421-22. The Supreme Court in *England* stated its "fundamental objections to any conclusion that *a litigant who has properly invoked the jurisdiction* of a Federal District Court to consider federal constitutional claims can be *compelled, without his consent and through no fault of his own*, to accept instead a state court's determination of those claims." *Id.* at 415 (emphasis added).

Consistent with *England's* focus on the problem of depriving a litigant who has "invoked" the jurisdiction of a federal court from being deprived of that choice "without his consent and through no fault of his own," the Supreme Court appeared to suggest in a subsequent case that an *England* reservation would only be available when the federal courts were a litigant's initial forum of choice. *See Allen v. McCurry*, 449 U.S. 90, 101 n. 17, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) (characterizing *England* as applying "[w]here a plaintiff properly *invokes federal-court jurisdiction in the first instance* on a federal claim" (emphasis added)). A similar suggestion was made in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 84-85 & n. 7, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). The question in *Migra* was whether litigants who could have, but did not, raise certain

claims in their state case were precluded from raising those claims in a subsequent § 1983 suit in federal court. The Court held that such litigants were indeed so precluded, and relied heavily on the fact that such litigants voluntarily chose to proceed initially in state court. The petitioner in *Migra*, the Court observed, did "not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court." *Id.* at 84-85. Having emphasized the voluntariness of the decision to file suit initially in state court, the Court then carefully noted that *England* provides a way for plaintiffs to return to federal court after a district court has abstained. *See id.* at 85 n. 7. By contrasting *England* with the situation in which a plaintiff has chosen to file suit in state court even though he could have sought an adjudication of his federal constitutional claims in federal court, *Migra* can be read to suggest that *England* was not aimed at litigants who initially brought suit in state court. *Cf. Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1306 (11th Cir.1992) ("The *Migra* Court made clear that *England* could apply when a litigant with a federal constitutional claim is *involuntarily* in state court." (emphasis added)).

In the instant case, plaintiffs did not invoke the jurisdiction of the federal court in the first instance, only to have the court invoke *Pullman* abstention. Instead, they filed suit in state court, which they believed would look upon their free-speech claims more favorably. Moreover, after defendants removed the case to federal court, plaintiffs moved to remand the case in its entirety (including their First Amendment claim) to state court, arguing that the case was not properly removable and also vigorously urging that their state constitutional claims "predominate[d]," while their First Amendment claim was a mere "adjunct" or "supplement." *See* Affirmation on Behalf of Amsterdam Video Plaintiffs, in Support of Motion to Remand, dated April 26, 1996 (United States District Court for the Southern District of New York,

No. 96 Civ. 2204), in Joint Appendix at 227. The district court, in response to plaintiffs' motion, abstained under *Pullman* and remitted the state claims to state court, but denied plaintiffs' request to remand the federal constitutional claims and instead stayed these claims pending the outcome of the state litigation. See 932 F.Supp. at 551. Only then did plaintiffs file an *England* reservation.

Under these circumstances, plaintiffs cannot meaningfully be said to have been deprived of a federal forum for their federal claims "without [their] consent and through no fault of [their] own." *England*, 375 U.S. at 415. If *defendants* had not sought to avail themselves of a federal forum after plaintiffs filed suit in state court, plaintiffs would have been held to their choice of forum and would have been required to submit their First Amendment claim to the New York state courts. The same would have been true if plaintiffs had been successful in moving to remand the entire case to state court. Alternatively, if plaintiffs' priority had been to obtain a federal forum for their First Amendment claim, they could have filed suit in federal court initially. *Cf. Migra*, 465 U.S. at 84-85 & n. 7. In light of *England's* emphasis on the need to preserve access to a federal forum *for those litigants who have chosen it*, and in light of the suggestive characterizations of *England* by the Supreme Court in the later cases of *Allen v. McCurry* and *Migra*, we agree with those courts that have held that *England* applies only to litigants who have sought to proceed in federal court in the first instance, and not to litigants such as the instant plaintiffs who voluntarily chose to file suit in state court. *See Peduto v. City of North Wildwood*, 878 F.2d 725, 729 n. 5 (3d Cir.1989) ("[A]s plaintiffs here invoked the jurisdiction of the state court in the first instance, the application of *England* has no relevance here."); *Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir.1988) (*England* "does not apply where the plaintiff voluntarily chooses to pursue a state action first."); *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 312 (1st Cir. 1986) ("In order to make an *England* reservation, a litigant must establish its right to have its federal claims adjudicated

in a federal forum by properly invoking the jurisdiction of the federal court in the first instance."); *cf. Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d at 1304-05 (considering itself bound by predecessor-circuit decision, *Jennings v. Caddo Parish Sch. Bd.*, 531 F.2d 1331, 1332 (5th Cir.), *cert. denied*, 429 U.S. 897, 97 S.Ct. 260, 50 L.Ed.2d 180 (1976), allowing plaintiffs to file *England* reservation prior to bringing suit in federal court, but noting that "*Jennings* effectively abolishes the first requirement for an *England* reservation – filing in the first instance in federal court. Thus, it appears that the *Jennings* panel misread *England*, effectively rewriting the requirements for a valid *England* reservation."); *see generally* 17A Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4243, at 6 (1998 Pocket Part) ("The *England* procedure strictly speaking is applicable only if a case was begun in federal court.").

We are not persuaded that a contrary result is required by footnote 13 of *England*, which contains some broad language seized upon by plaintiffs, but which we read simply to indicate that an *England* reservation is available not only to plaintiffs, but also to defendants who have removed the case to federal court, only to have the district court abstain. Footnote 13 states:

> The reservation may be made by any party to the litigation. Usually the plaintiff will have made the original choice to litigate in the federal court, but the defendant also, by virtue of the removal jurisdiction, 28 U.S.C. § 1441(b), has a right to litigate the federal question there. Once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question. Thus, while a plaintiff who unreservedly litigates his federal claims in the state courts may thereby elect to forgo his own right to return to the District Court, he cannot impair the corresponding right of the defendant. The latter may protect his right by either declining to oppose the

> plaintiff's federal claim in the state court or opposing it with the appropriate reservation.

England, 375 U.S. at 422 n. 13. Despite plaintiffs' reliance on the statement that "[o]nce issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question," we believe that it is clear, in context, that this footnote was only intended to clarify that *England* applies to defendants as well as plaintiffs, and that the particular language relied upon by plaintiffs was intended simply to clarify that a plaintiff may not, by fully litigating his federal claims in state court, deprive a defendant of his right to return to the federal forum. We do not read this language to render irrelevant a plaintiff's choice to avail himself of state, rather than federal, jurisdiction in the first instance, and we believe such a reading would contravene *England's* emphasis on preserving the federal forum for those who have "invoked" it but have been deprived of it "through no fault of [their] own." *Id.* at 415. Plaintiffs not only voluntarily filed suit in state court, but sought to remand the entire case to state court after it had been removed to federal court by defendants; while footnote 13 of *England*, under these circumstances, would have protected *defendants* from being deprived of their choice of a federal forum, it does not allow defendants' choice of a federal forum to be preserved by *plaintiffs*.

III.

Apart from their reliance on *England*, plaintiffs raise several other arguments as to why collateral estoppel does not apply, each of which is without merit. First, citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), plaintiffs argue that because their federal claim arises under the First Amendment, they are entitled to an independent examination of the record. In First Amendment cases, notwithstanding the "clearly erroneous" standard of factual review set forth in

Fed.R.Civ.P. 52(a), "we are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court." *Bery*, 97 F.3d at 693 (citing, *inter alia, Bose Corp.*, 466 U.S. at 499). However, this rule only concerns the proper level of *appellate* review, and does not bar the application of collateral estoppel. *See Ferris v. Cuevas*, 118 F.3d 122, 125 n. 3 (2d Cir.1997) (citing *Bose* requirement, but noting, pursuant to finding plaintiffs' First Amendment claims that were not raised in prior state-court proceedings to be barred by *res judicata*, that "[b]ecause our holding today is procedurally based and does not reach the merits ... we do not conduct this higher level of factual review.").

Plaintiffs also rely on the doctrine that "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana*, 440 U.S. at 159. They argue that such a change occurred when Mayor Rudolph W. Giuliani, one of the defendants in this action, stated at a press conference following the New York Court of Appeals' decision that the Zoning Amendment would "severely limit[ ]" the places adult establishments could relocate to, and would "reduce the number in the city to something like 20 or 30." Text of Mayor Giuliani's City Hall Press Conference, February 24, 1998, in Joint Appendix at 914. *Montana* makes clear that the exception to collateral estoppel based on intervening changes in the factual record applies only when these changes "significant[ly]" affect the overall complexion of the record. See 440 U.S. at 157; 18 James Wm. Moore, *et al., Moore's Federal Practice* § 132.02(2)(e), at 132-27 to -28 (3d ed. 1998) (in order to render issue preclusion inapplicable, "a difference in pertinent facts" must be "sufficient to substantially change the issue"). Mayor Giuliani's statements to the press, particularly when compared to the extensive legislative record compiled by the City – whose conclusions actually differ from those stated at Mayor Giuliani's press conference – simply do not meet that standard.

A final point that, in plaintiffs' view, counsels against the application of collateral estoppel, is that Supreme Court review is unavailable with respect to the New York state courts' determination of a question of state law. This argument fails to appreciate that the district court made a determination of federal law – namely, that the issues decided and the standards applied by the New York courts are the same as those that would be dispositive under the First Amendment. If the district court's interpretation of the governing First Amendment standards were mistaken, and if this Court were mistaken in affirming the district court's interpretation of federal law, the Supreme Court would remain free to so find and to order this case to proceed in district court.

IV.

In sum, under the full faith and credit statute and New York's law of collateral estoppel, plaintiffs may not relitigate their First Amendment claim in federal court because the same issues that are dispositive of this claim have already been decided in state court. Plaintiffs had a full and fair opportunity to litigate these issues in state court, and they raise no valid ground for barring the application of the doctrine of collateral estoppel. Accordingly, plaintiffs can show neither "a likelihood of success on the merits" nor "sufficiently serious questions going to the merits to make them a fair ground for litigation," and the district court's denial of plaintiffs' motion for a preliminary injunction was entirely proper. We have considered all of plaintiffs' other arguments, and find them to be without merit. The stay of Judge Cedarbaum's March 6, 1998 order is hereby vacated, the judgment of the district court is affirmed, and the Zoning Amendment may be enforced forthwith.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: HONORABLE
DENNIS JACOBS,
HONORABLE
PIERRE N. LEVAL,
HONORABLE
JOHN R. GIBSON,*
Circuit Judges.

United States
Court of Appeals
Filed
March 17 1998
George Lange III,
Clerk
Second Circuit

AMSTERDAM VIDEO

v.

CITY OF NEW YORK

ORDER

978-7270

HICKERSON

v.

CITY OF NEW YORK

98-7269

On October 25, 1995 the New York City Council passed the Zoning Amendment at issue in this case (the "Amendment"), which established controls over the geographic distribution of adult entertainment establishments in the City of New York. Shortly thereafter, plaintiffs brought this action challenging the constitutionality of the Amendment under both the New York and federal constitutions. Since that time, while this action was litigated in both the State and federal courts, the effectiveness of the Amendment has been stayed by court order.

* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

On March 6, 1998, Judge Cedarbaum terminated the stay by her order denying Plaintiffs' application for a preliminary injunction. Plaintiffs appeal from that decision and move for a stay of that order pending determination of the appeal, so that the effectiveness of the Amendment would remain subject to the previously imposed stay while the appeal was under consideration. Judge Cederbaum stayed her order until March 11, 1998, so that plaintiffs could seek a stay in this court. Judge Walker extended the stay to this date so that the issue could be considered by a three-judge panel of the court.

Plaintiffs contended that the district court's decision is likely to be reversed on appeal because it relied inappropriately on the doctrine of collateral estoppel. The defendants contend and the district court found, that the questions adjudicated by the New York State courts with respect to the State Constitution derived from the Supreme Court's opinion in *City of Renton v. Playtime Theaters, Inc.*, 106 S.Ct. 925 (1986), and were either identical to, or encompassed, the questions of constitutionality under the federal constitution, so that the New York State courts must be found to have implicitly upheld the constitutionality of the Amendment under the federal constitution. Plaintiffs contend that, in finding that the Amendment does not violate the Constitution of the State of New York, the New York courts did not necessarily adjudicate whether the Amendment violates the United States Constitution, The only issue before this panel is whether the stay should be extended pending resolution of the appeal.

We have found two questions arising on the appeal to be sufficiently troublesome to justify continuing the stay:

The first is whether generalized legal standards incorporated in New York law, deriving from the *Renton* opinion, such as the "substantiality" of the government interest served by the ordinance and the "reasonableness" of alternative avenues that remain for communication, necessarily have the same meaning in federal constitutional

law, so that the adjudication of the New York question necessarily answered the federal question.

The second question is whether the unavailability of Supreme Court review of the New York courts' determination of a question of New York State law should affect the appropriateness of collateral estoppel.

Accordingly, we hereby direct that the stay initially ordered by the district judge shall be extended through the hearing of the appeal, or until further order of this court. *See Cooper v. Town of East Hampton*, 83 F.3d. 31, 36 (2d Cir. 1996).

The appeal is hereby expedited. Appellants' briefs shall be filed by March 27, 1998. Appellees' brief shall be filed by April 8, 1998. Reply briefs by April 13, 1998. The case may be placed on the calendar for argument as early as April 27, 1998.

FOR THE COURT:

/s/ Lucille Carr

George Lange III, Clerk
By: Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RACHEL HICKERSON, *et al.*,

Plaintiffs,

– against –

THE CITY OF NEW YORK, *et al.*,

Defendants.

OPINION

96 Civ. 2203 (MGC)

AMSTERDAM VIDEO INC., *et al.*,

Plaintiffs,

– against –

THE CITY OF NEW YORK, *et al.*,

Defendants.

96 Civ. 2204 (MGC)

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CEDARBAUM, District Judge.

Plaintiffs in these two actions move for a temporary restraining order and preliminary injunction staying enforcement of Text Amendment N 950384 to the Zoning Resolution of the City of New York (the "Amended Zoning Resolution"), which regulates the zoning of "adult establishments."[1] The motion is denied for the reasons that follow.

In a case in which the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the issuance of a preliminary injunction requires the movant to demonstrate both irreparable harm and a likelihood of success on the merits. *NAACP v. Town of East Haven*, 70 F.3d 219, 223 (2d Cir.1995). This standard is particularly appropriate where a municipal regulation has been carefully examined by all of

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[1] Complete descriptions of the Amended Zoning Resolution can be found in this Court's prior opinion, *Hickerson v. City of New York*, 932 F.Supp. 550 (S.D.N.Y.1996), and in *Stringfellow's of New York, Ltd. v. City of New York*, 171 Misc.2d 376, 653 N.Y.S.2d 801 (N.Y.Sup. 1996), *aff'd*, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407 (1998).

the courts of the state, including the highest court, and its validity has been upheld under a state constitution that provides broad protection for individual rights.

A violation of the First Amendment of the Constitution of the United States is itself irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Accordingly, when an injunction is sought to protect First Amendment rights, likelihood of success on the merits and irreparable harm merge into a single threshold requirement. Preliminary injunctive relief is not warranted in this case because plaintiffs have not shown likelihood of success on the merits.

BACKGROUND

Plaintiffs in the Hickerson action are Manhattan and Bronx residents who allege that they regularly patronize adult establishments. They claim that the Amended Zoning Resolution will prevent them from continuing to patronize the adult establishments they currently frequent, and will reduce significantly the number of alternative establishments available to them. Plaintiffs in the Amsterdam action are owners and operators of business establishments which they allege are adult establishments as defined by the Amended Zoning Resolution. They allege that the resolution will force them to terminate the operation of their businesses and thereby cause them significant economic harm.

Both groups of plaintiffs originally sued in the Supreme Court for New York County, asserting claims of violation of freedom of expression under the New York Constitution and the Constitution of the United States. Defendants, the City of New York and three city officials, removed the actions to this Court because of the federal questions presented by the complaints. Plaintiffs promptly sought to return to the state court by moving to remand the actions in their entirety. On June 27, 1996, plaintiffs' motions to remand were granted in part and denied in part. Under the doctrine of abstention of

Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), all of plaintiffs' state claims were remanded to New York County Supreme Court, while the federal claims were stayed pending resolution of the state claims. *Hickerson v. City of New York*, 932 F.Supp. 550 (S.D.N.Y.1996).

State Court Proceedings

After remand of the state constitutional claims, defendants moved for summary judgment on those claims. Before defendants filed their summary judgment motion, plaintiffs conducted some discovery, including a deposition of Marilyn Mammano, a staff person at the Department of City Planning.

In support of summary judgment, defendants submitted a number of affidavits and virtually the entire legislative record of the Amended Zoning Resolution, including various studies and reports on adult businesses, the records of public hearings related to the Amended Zoning Resolution, and maps purporting to show permissible locations for the operation of adult establishments under the law. In opposition to the defendants' motion, plaintiffs submitted numerous affidavits and legal memoranda, including an extensive affidavit from a land use expert, R. Bruce McLaughlin. McLaughlin's affidavit addressed the availability of alternative sites for the businesses required by the Amended Zoning Resolution to close or relocate. It appears from McLaughlin's affidavit that he had been studying the matter for many months. According to the affidavit, McLaughlin personally visited every one of the more than 500 sites identified by the defendants as available for adult establishments. Moreover, documents attached to the affidavit included an analysis prepared in August 1995, while the Amended Zoning Resolution was under consideration and approximately one year before defendants moved for summary judgment.

On October 23, 1996, Justice Marylin G. Diamond of the New York County Supreme Court granted defendants' motion for summary judgment on plaintiffs' state constitutional claims. *Stringfellow's of New York, Ltd. v. City of New York*, 171 Misc.2d 376, 653 N.Y.S.2d 801 (N.Y.Sup.1996), *aff'd*, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406 (1998). Justice Diamond found that the Amended Zoning Resolution was not an attempt to regulate speech but rather was motivated by concerns other than those related to speech, and, in particular, by a reasonable belief that adult establishments produce undesirable secondary effects such as neighborhood deterioration, crime and decreased property values. Justice Diamond found that, in enacting the Amended Zoning Resolution, the City reasonably relied on a number of studies undertaken in New York City and elsewhere concerning the secondary effects of adult establishments. She also found that the Amended Zoning Resolution is no broader than is necessary to address the negative effects associated with adult establishments.

Finally, Justice Diamond found that the Amended Zoning Resolution provides ample space for adult establishments, leaving almost 4% of New York City's total land area available for use by such establishments. She stated that defendants had "more than sufficiently demonstrated that the permissible areas are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate. While plaintiff's have labored mightily to create issues of fact, none exist." *Id.* 653 N.Y.S.2d at 814. This conclusion was based in part on the specific analysis provided in the affidavit of William Bernstein, First Deputy Executive Director of the Department of City Planning, and other affidavits submitted by the defendants, who represented that approximately 500 potential relocation sites existed in New York City. She also considered McLaughlin's affidavit, which concluded that the actual number of available alternative sites was much smaller than the 500 or so claimed by the defendants. Justice Diamond found that McLaughlin's

methodology was "fatally flawed" because it unjustifiably eliminated a number of sites based on factors that McLaughlin claimed make certain sites unavailable. *Id.* at 812. These factors included the undeveloped state of the proposed site, suitability for some "generic commercial enterprise," presence of a long-term lessee, current use as a parking lot and lease clauses prohibiting adult uses. Noting that such factors have been repeatedly rejected by state and federal courts, Justice Diamond found that McLaughlin and plaintiffs failed to rebut defendants' evidence that ample sites were available for the relocation of adult establishments. In so doing, she stated:

> Although 10 months have passed since McLaughlin states he obtained zoning maps maintained by the DCP, he claims that he cannot estimate the acreage size of the permissible zones because of lack of time. He also fails to offer his own number of potential relocation sites under either the City's methodology or his own methodology to rebut the City's calculation.

Id. Justice Diamond rejected plaintiffs' contention that the defendants' estimate of 500 sites was invalid because it was generated by computer and not by inspection of the actual sites. She determined from the deposition testimony of Marilyn Mammano that the defendants' computation of alternative sites was properly calculated, based on conservative measurements, and, while not "site specific," was an acceptable estimate of the potential number of sites in the permissible areas. *Id.* at 812-813.

Finally, Justice Diamond rejected plaintiffs' request for additional discovery, because the administrative record before the court was "thorough, extensive and comprehensive." *Id.* at 813.

The decision of the New York County Supreme Court was unanimously affirmed by both the Appellate Division, 663 N.Y.S.2d 812 (1st Dep't 1997), and the New York Court of Appeals, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d

406 (1998). Holding that the state constitutional standards governing regulations such as the Amended Zoning. Resolution are substantially the same as the federal standards, the Court of Appeals relied on both state and federal authority to hold that the Amended Zoning Resolution had a purpose unrelated to speech, imposed restrictions no broader than necessary to implement the legitimate concerns of the legislature, and provided for reasonable alternative avenues of communication. Thus, after a thorough review of the record below, the Court of Appeals held that the resolution did not violate the state constitution and could be enforced by defendants. 694 N.E.2d at 420, 671 N.Y.S.2d at 419.

On February 26, 1998, plaintiffs returned to this Court seeking a temporary restraining order and a preliminary injunction against the enforcement of the Amended Zoning Resolution.

DISCUSSION

Defendants contend that the doctrine of collateral estoppel precludes plaintiffs from relitigating in this Court the same factual issues that have already been tried and decided in the state court. The preclusive effect of a state court determination in a subsequent federal proceeding is governed by the rules of the state in which the prior action was tried. 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *State of New York v. Sokol*, 113 F.3d 303, 306 (2d Cir.1997). Under New York law, a factual issue determined in a prior litigation is given preclusive effect if the issue to be precluded was necessarily decided in the prior litigation and the party opposing preclusion had a full and fair opportunity to litigate the issue. *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 478 N.Y.S.2d 823, 826, 467 N.E.2d 487 (1984); *Sokol*, 113 F.3d at 306. Collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party ... and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v.*

Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). Where factual determinations by a state court are at issue, collateral estoppel also "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96.

The First Amendment standard applicable to a content-neutral zoning ordinance regulating the location of adult entertainment businesses was established by the Supreme Court of the United States in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Under *Renton*, zoning ordinances of the kind at issue in these actions are content neutral time, place, and manner regulations if the legislative purpose is other than the restriction of speech. According to *Renton*, such a content neutral ordinance is permissible if it is "designed to serve a substantial governmental interest" and "allows for reasonable alternative avenues of communication." *Id.*, 475 U.S. at 50.

Each of the inquiries set out by the Supreme Court in *Renton* – the legislative purpose, whether the ordinance is designed to advance a substantial government interest, and the availability of reasonable alternative avenues of communication – is factual issue that has been litigated by plaintiffs and decided by the Supreme Court for New York County and affirmed by both the Appellate Division and the New York Court of Appeals. After extensive submissions by the parties, Justice Diamond held that (1) the City acted in response to concerns regarding the secondary effects of adult establishments; (2) the City reasonably relied on a number of studies to conclude that adult businesses produce adverse secondary effects; (3) the Amended Zoning Resolution is "no broader than necessary" to prevent those adverse effects; and (4) defendants had "more than sufficiently demonstrated that the permissible areas" for adult establishments remaining in the City "are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate." 653 N.Y.S.2d at 803, 808, 809, 814.

Each of those inquiries was necessarily decided in the state court proceedings, and plaintiffs had a full and fair opportunity to litigate the issues in the state courts. Accordingly, if the doctrine applies, those issues are precluded from further litigation in this Court under the doctrine of collateral estoppel, now known as issue preclusion.

Plaintiffs offer no persuasive reason to be permitted to relitigate in this Court the very same issues they litigated in the state courts in order to persuade this Court to reach a different factual result. Plaintiffs contend that under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), they reserved their rights to relitigate these issues in federal court. The *England* case preserves a plaintiff's right to relitigate in federal court all issues related to the federal issues when the federal court is plaintiff's chosen forum, and plaintiff is forced, over its objection, to litigate those issues in state court because a federal judge sua sponte decides to abstain under *Pullman*. Here, however, plaintiffs' chosen forum was emphatically the state court. After plaintiffs filed these actions in state court, defendants removed them to this Court. Plaintiffs promptly moved to remand all their claims to the state court, and fought vigorously to return to their chosen forum, the state court. *England* does not govern or prohibit issue preclusion in these actions.

Plaintiffs also contend that they did not get a full and fair opportunity to litigate in state court. Under the New York law of issue preclusion, the party seeking preclusion has the burden of demonstrating the identity of the issues and that the issues were actually and necessarily decided in the prior litigation. The party opposing collateral estoppel has the burden of establishing the absence of a full and fair opportunity to litigate the issues in the prior action. *Sokol*, 113 F.3d at 306. A determination of whether a full and fair opportunity to litigate was provided requires consideration of the "realities" of the prior litigation. The factors to be considered include: (1) the nature of the forum and the

importance of the claim in the prior litigation; (2) the incentive to litigate and the actual extent of litigation; (3) the competence and experience of counsel; and (4) the foreseeability of future litigation. *Ryan*, 478 N.Y.S.2d at 827, 467 N.E.2d 487.

Plaintiffs complain that the actions were decided on summary judgment and after inadequate opportunity for discovery. Plaintiffs contend that their expert was not given adequate time to prepare his analysis of the purported alternative sites. Plaintiffs also argue that they were denied access to "critical information" such as how maps of permissible relocation areas were generated by the City. Finally, plaintiffs argue that they were not permitted to file a surreply after the City introduced new evidence and arguments on reply relating to the availability and suitability of potential sites.

The mere fact that a case is resolved on summary judgment and does not proceed to trial does not deny a party a full and fair opportunity to litigate. *See, e.g., Tobias v. First City National Bank and Trust Co.*, 709 F.Supp. 1266, 1270-1271 (S.D.N.Y.1989). Moreover, the "full and fair opportunity" requirement does not entitle a party to unlimited discovery. Indeed, state court proceedings permitting no discovery at all can be entitled to preclusive effect in federal court. *McBride v. Bratton*, 1996 WL 636075, at *3 (S.D.N.Y. November 4, 1996), *aff'd*, 122 F.3d 1056, 1997 WL 383521 (2d Cir.1997). It is undisputed that plaintiffs viewed the New York courts as the main forum and the New York Constitution as the principal basis for their extremely important effort to prevent New York City from requiring them to close and move their businesses. Plaintiffs were represented by experienced and highly competent counsel. They were permitted some discovery, and had a full opportunity to press any procedural grievances in addition to their substantive claims in the state courts.

Plaintiffs were permitted to take the deposition of Marilyn Mammano, designated by defendants as the staff

person familiar with the calculation made by defendants with respect to available alternative sites. Plaintiffs complain that Ms. Mammano was repeatedly directed not to answer questions, including questions related to the methodology of calculating the number of alternative sites and the suitability of alternative sites. Plaintiffs also complain that their requests for documents on these topics – those reviewed by Ms. Mammano before the deposition, and other documents – were denied. On the other hand, plaintiffs themselves point to a great deal of information from the Mammano deposition that they used to support their position in the state court, including testimony relating to the degree of defendant's investigation of alternative sites.

The New York courts themselves addressed plaintiffs' demands for discovery. Justice Diamond noted that plaintiffs' expert had zoning maps for 10 months before he made his submission in opposition to defendants' motion for summary judgment, and that with those maps, he could have estimated the acreage size of the permissible zones. Nevertheless, he failed to calculate the number of potential relocation sites under his methodology. She also expressly addressed plaintiffs' claim that additional discovery was needed, "in view of the present administrative record that this court finds to be thorough, extensive and comprehensive." 653 N.Y.S.2d at 813. Moreover, the New York Court of Appeals noted that before issuing a decision, the New York County Supreme Court ordered defendants to respond to interrogatories served by the Hickerson plaintiffs, to provide maps of alternative sites that eliminated encumbered areas, and to produce Ms. Mammano for deposition. The record before Justice Diamond totaled more than 10,000 pages, including pleadings, affidavits, exhibits and briefs. 671 N.Y.S.2d at 412, 694 N.E.2d at 413.

In sum, plaintiffs have not shown that they did not have a full and fair opportunity to litigate ably and vigorously in the state courts the very factual issues that are dispositive of their claim under the First Amendment. Accordingly, the factual findings of the New York County Supreme Court as affirmed

by the Appellate Division and the Court of Appeals are entitled to preclusive effect.

It should be noted that the zoning resolution attacked in this case under the First Amendment is before the Second Circuit in the case of *Buzzetti v. City of New York*, 1997 WL 164284 (S.D.N.Y. April 8, 1997). That case has been argued before the Second Circuit and is pending decision in that court.

This order denying a preliminary injunction is stayed until the close of court business on Monday, March 9, 1998 so that plaintiffs can promptly seek from the Second Circuit a stay pending appeal.

SO ORDERED.

Dated: New York, New York
March 6, 1998

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

STATE OF NEW YORK
COURT OF APPEALS

STRINGFELLOW'S OF NEW YORK, LTD.,

Appellant,

v.

THE CITY OF NEW YORK, et al.,

Respondents,

TIMES SQUARE BUSINESS
IMPROVEMENT DISTRICT, et al.,

Intervenors-Respondents.

AMSTERDAM VIDEO INC., et al.,

Appellants,

v.

THE CITY OF NEW YORK, et al.,

Respondents,

TIMES SQUARE BUSINESS
IMPROVEMENT DISTRICT, et al.,

Intervenors-Respondents.

RACHEL HICKERSON, et al.,

Appellants,

v.

THE CITY OF NEW YORK, et al.,

Respondents,

TIMES SQUARE BUSINESS
IMPROVEMENT DISTRICT, et al.,

Intervenors- Respondents.

Mark J. Alonso, P.C., New York City (Mark J. Alonso and Anna E. Bornstein, of counsel), for appellant in the first above-entitled action.

Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, New York City (Herald Price Fahringer and Erica T. Dubno, of counsel), for appellants in the second above-entitled action.

Arthur Eisenberg, Norman Siegel and Beth Haroules, New York City, for appellants in the third above-entitled action.

Jeffrey D. Friedlander, Acting Corporation Counsel of New York City (Leonard Koerner, Albert G. Fredericks and Elizabeth S. Natrella, New York City, of counsel), for respondents in the first, second and third above-entitled actions.

Cravath, Swaine & Moore, New York City (Frederick A.O. Schwarz, Jr. and Justin J. Daniels, of counsel), for Times Square Business Improvement District, intervenor-respondent in the first, second and third above-entitled actions.

Dewey Ballantine, L.L.P., New York City (Wayne A. Cross and Heather K. McDevitt, of counsel), Dennis J. Saffran and Brian M. Stettin, for Center for the Community Interest and others, intervenors-respondents in the first, second and third above-entitled actions.

Morrison & Foerster, L.L.P., New York City (Michelle N. Kim, of counsel), for Association of the Bar of the City of New York, *amicus curiae* in the first, second and third above-entitled actions.

Zane and Rudofsky, New York City (Edward S. Rudofsky, Martin P. Mehler, Charles F. Axelrod and Arlene H. Schechter, of counsel), for Council of Regulated Adult Liquor Licensees, *amicus curiae* in the second above-entitled action.

Berkman, Gordon, Murray & De Van, Cleveland, OH (J. Michael Murray, of the Ohio Bar, admitted *pro hac vice*, of

counsel), for First Amendment Lawyers Association, amicus curiae in the second and third above-entitled actions.

OPINION OF THE COURT

TITONE, Judge.

This appeal concerns the validity of New York City's Amended Zoning Resolution governing the location of adult entertainment establishments throughout the five boroughs. We conclude that on this record the Supreme Court correctly granted summary judgment declaring that the challenged ordinance does not violate plaintiffs' constitutional rights of free expression.

I. Factual Background

The "adult" establishments at the center of this controversy offer various forms of sexual expression. These businesses include bookstores, theaters, stores dealing in videotaped material and places of live entertainment. In 1965, there were only nine such establishments in New York City. That figure has fluctuated over the past 30 years, but the last decade has experienced a steady growth in the industry, with sections of Manhattan and Queens showing the greatest development. By 1993, there were 177 adult establishments operating in New York City: 107 in Manhattan, 44 in Queens, 15 in Brooklyn, eight in the Bronx and three in Staten Island.

In September of 1993, the Department of City Planning (DCP) undertook an evaluation of the impact of such property uses on urban life. Published in September 1994, the DCP study was divided into two parts. First, the DCP examined similar studies conducted in nine other localities: Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California; Austin, Texas; Phoenix, Arizona; Manatee County, Florida; New Hanover County,

North Carolina; and the State of Minnesota. The DCP found evidence in these reports that adult businesses often have such negative secondary impacts as increased crime rates, depreciated property values and deteriorated community character.

The DCP also sought to identify the specific adverse secondary effects caused by adult establishments in New York City itself. To accomplish that goal, the DCP both conducted its own independent analysis of six selected areas in the City and examined other earlier studies of the City's adult uses. Among the other materials examined were a 1977 report by the City Planning Commission (CPC); a 1983 Annual Report of the Mayor's Office of Midtown Enforcement; a 1993 study conducted by the Chelsea Action Coalition and Manhattan Community Board 4; testimony at an October 1993 public hearing before the Task Force on the Regulation of Sex-Related Businesses; an April 1994 Times Square Business Improvement District (TSBID) study; and a 1993 survey compiling media accounts and complaint correspondence to City agencies.

The DCP's independent study confirmed that the number of adult establishments in the City had increased considerably in recent years. The DCP further found that as adult uses proliferated, they tended to cluster. In Manhattan, for example, adult businesses were concentrated in central locations such as the Times Square area. In the other boroughs, such businesses lined major vehicular routes such as Queens Boulevard in Queens and Third Avenue in Brooklyn. Additionally, the vast majority of adult establishments were located in zoning districts that permitted residential development.

Based on the material before it, the DCP determined that there were significant adverse impacts attributable to adult enterprises in the City, including downward pressure on property values and increased crime rate in areas where adult uses are most concentrated. A pivotal finding of the DCP was that a large majority of surveyed business and community

organizations believe that their neighborhoods are adversely affected by the presence of adult uses and that this perception itself leads to disinvestment and a marked decline in economic and pedestrian activity.

II. The Challenged Ordinance

The Zoning Resolution of the City of New York, adopted on December 15, 1960, regulates commercial establishments in the City. Historically, the Resolution did not distinguish between adult establishments and other commercial ventures. Like other businesses, adult enterprises simply had to satisfy the requirements for the particular "use group" into which they were classified. Consequently, adult uses were permitted in most of the City's commercial and manufacturing districts, which frequently also allowed residential development or were mapped close to residential districts.

Prompted by the findings and final recommendation of the DCP study that adult establishments should be regulated differently from other commercial establishments because of their unique negative effects, the CPC directed the DCP in November of 1994 to draft a set of adult-use zoning restrictions. Concomitantly, the City Council imposed a one-year moratorium on the creation or enlargement of adult-use establishments.

On March 21, 1995, the DCP and the City Council Land Use Committee jointly sought to amend the Zoning Resolution and establish a permanent and comprehensive set of regulations governing adult uses. Over the next several months, the City's 59 community boards, five borough boards and borough presidents, the CPC and the City Council reviewed the proposed amendments and conducted public hearings. On September 18, 1995, the CPC approved the proposed amendments, noting that they were "an appropriate and necessary response to the adverse secondary effects stemming from adult establishments" and that they nonetheless continue "to provide ample opportunity for adult-

establishments to locate and operate throughout New York City." After further public hearings and debate, the City Council gave final approval to Text Amendment N 950384 ZRY on October 25, 1995.

As adopted by the City Council, the amendments are applicable to any "adult establishment," defined as those commercial enterprises in which a "substantial portion" of the premises are used as an "adult book store," an "adult eating or drinking establishment," an "adult theater" or "other adult commercial establishment" (Amended Zoning Resolution § 12-10). Covered facilities are those within the foregoing four categories that "regularly feature" or devote a "substantial portion" of their stock-in-trade to entertainment or material that is "characterized by an emphasis on" "specified anatomical areas" or "specified sexual activities" (id.). "Adult eating or drinking establishments," "adult theaters" and "other adult commercial establishments" are covered only if they exclude minors because of their age (*id.*).

The amendments to the zoning code include an array of site limitations and anticlustering provisions. Under provisions that predate the amendments, new commercial establishments, including new adult establishments, are barred from the City's residential zones. Under the amendments, adult establishments, new and old, are now also barred from certain districts that are zoned for manufacturing and commercial use but also permit residential development. The regulated uses are permitted in all other manufacturing districts and in all high-density, general commercial districts (Amended Zoning Resolution § 32-01 [a]; § 42-01[a]).

Within those districts where adult uses are authorized, the adult establishment must be located at least 500 feet from schools, houses of worship, day care centers, other adult uses and zoning districts where new residential development is allowed (Amended Zoning Resolution § 32-01[b]; § 42-01[b]). In addition, no more than one adult establishment may be located on a single zoning lot, and these

establishments cannot exceed 10,000 square feet of usable floor area and cellar space (Amended Zoning Resolution § 32-01 [d], [e]; § 42-01[d], [e]). The amendments also impose restraints on the size, placement and illumination of accessory business signs (Amended Zoning Resolution §§ 32-69, 42-55).

Any adult establishment operating in a prohibited location must either conform or terminate its business within one year of the amendments' effective date (Amended Zoning Resolution §§ 52-77, 52-734). An exception to this termination requirement is available for existing businesses which are noncompliant only because (1) their area exceeds 10,000 square feet, (2) they are located on a zoning lot with another adult use, or (3) they are situated less than 500 feet from another adult establishment (Amended Zoning Resolution § 32-01[f]; § 42-01[f]). Another narrow exception is made for otherwise conforming adult uses that fall out of compliance because of the subsequent siting of a school or house of worship within 500 feet of their boundaries (Amended Zoning Resolution § 32-01[b]; § 42-01[b]). Lastly, adult establishments faced with the one-year termination deadline can apply for an extension to the Board of Standards and Appeals, which may permit the applicant to remain open for a limited time to amortize any substantial and unrecovered costs associated with the adult portion of the establishment (Amended Zoning Resolution § 72-40).

III. Procedural History

On February 27, 1996, the *Amsterdam Video* plaintiffs, consisting of more than 100 owners and operators of adult establishments in the City, and the *Hickerson* plaintiffs, consisting of four patrons of such establishments, commenced actions in Supreme Court, New York County, against the City and related officials. Plaintiffs alleged that the Amended Zoning Resolution deprived them of their right to free expression protected by article I, § 8 of the New York State Constitution and the First Amendment to the United

States Constitution. Plaintiffs sought relief in the form of a judgment declaring the zoning amendments unconstitutional and enjoining their enforcement.

Defendants removed the case to the United States District Court for the Southern District of New York, but on plaintiffs' application the court remanded plaintiffs' causes of action grounded in the State Constitution, retaining jurisdiction over the Federal claims (932 F.Supp. 550). Subsequently, Stringfellow's, a cabaret featuring topless dancers, separately challenged the constitutionality of the amendments and sought injunctive relief. Supreme Court then granted the intervention motions of TSBID, the Center for Community Interest, and 45 other community groups, business organizations and local elected officials and consolidated the actions for hearing.

On August 26, 1996, defendants moved for summary judgment. The *Amsterdam Video* and *Stringfellow's* plaintiffs cross-moved for summary judgment; the *Hickerson* plaintiffs opposed defendants' motions but declined to cross-move for summary judgment on the theory that the case involved material factual disputes warranting a trial. Before issuing its decision, Supreme Court ordered additional discovery, in particular directing defendants to answer interrogatories served by the *Hickerson* plaintiffs, to provide maps to demonstrate the areas where adult uses would be permitted when encumbered areas were eliminated, and to produce for a deposition a person familiar with the DCP's calculation of the total number of alternative sites that would be available to relocated adult establishments under the amendments. A voluminous record of pleadings, affidavits, exhibits and briefs totaling more than 10,000 pages was before the court on the various summary judgment motions.

On October 23, 1996, Supreme Court granted defendants' motions for summary judgment and declared that "the Amended Zoning Resolution does not violate plaintiffs' rights of freedom of expression guaranteed under the State Constitution, and is, therefore, constitutional" (171 Misc.2d

376, 397, 653 N.Y.S.2d 801). Applying the test articulated by this Court in *Matter of Town of Islip v. Caviglia*, 73 N.Y.2d 544, 558-559, 542 N.Y.S.2d 139, 540 N.E.2d 215, Supreme Court first concluded that the amendments were content neutral. The court found in the City's planning studies sufficient evidence of adverse secondary effects to support use of its zoning authority to address a serious neighborhood problem. Additionally, the court held that the amendments were no broader than necessary to achieve their stated purpose, with zoning being the most appropriate response to address existing and anticipated future problems. Further, in the court's view, defendants had sufficiently demonstrated that the number of potential relocation sites under the Amended Zoning Resolution was more than adequate to accommodate the existing number of businesses. Plaintiffs' claim of a lack of available alternative sites, in contrast, was speculative and rested on discredited theories. Thus, the court concluded, no issues of material fact existed requiring a trial. The Appellate Division unanimously affirmed (241 A.D.2d 360, 663 N.Y.S.2d 812) and plaintiffs took an appeal as of right pursuant to CPLR 5601(b)(1).[1]

IV. Analysis

This Court has long recognized the considerable authority of municipalities to implement zoning plans and programs to meet the increasing encroachments of urbanization on the quality of their residents' lives (*see, e.g., Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265; *Matter of Harbison v. City of Buffalo*, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42). Because they are legislative enactments, these land-use regulations

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[1] Enforcement of the Amended Zoning Resolution was stayed pursuant to an Appellate Division order dated October 24, 1996 and a subsequent agreement among the parties. On September 23, 1997, this Court denied defendants' request for a vacatur of the stay (90 N.Y.2d 933, 664 N.Y.S.2d 266, 686 N.E.2d 1362).

generally enjoy a strong presumption of con-stitutionality as valid exercises of the State's police power to advance the public health, safety and welfare (*see, McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 548-549, 498 N.Y.S.2d 128, 488 N.E.2d 1240; *Udell v. Haas*, 21 N.Y.2d 463, 469-470, 288 N.Y.S.2d 888, 235 N.E.2d 897). Thus, even if the validity of a provision is "fairly debatable," the municipality's judgment as to its necessity must control (*Matter of Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 186, 351 N.Y.S.2d 129, 306 N.E.2d 155).

Municipal zoning authority is not, however, completely unfettered. Ordinances such as the one challenged here that aim to curb "adult" uses implicate speech or conduct that is protected by the First Amendment (*see, e.g., Schad v. Mount Ephraim*, 452 U.S. 61, 65, 101 S.Ct. 2176, 2180-2181, 68 L.Ed.2d 671; *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-2615, 37 L.Ed.2d 419; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503, 72 S.Ct. 777, 780-781, 96 L.Ed. 1098) and by article I, § 8 of the New York State Constitution.[2] Consequently, in weighing the validity of such zoning regulations, courts must consider the intertwined constitutional values of free expression.

In this State, the proper balance between community needs and free expression under our Constitution has been delineated in *Matter of Town of Islip v. Caviglia*, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215, *supra*. At issue in *Islip* was a zoning ordinance that confined adult uses to industrially zoned areas and prohibited them from locating within 500 feet of a number of certain sensitive receptors or within one-half mile of each other. The ordinance had been prompted by studies of conditions locally and elsewhere which demonstrated the harmful impact of adult businesses on the surrounding community. We concluded that the

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[2] Article I, § 8 provides in relevant part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

ordinance satisfied both Federal constitutional standards (*see, Renton v. Playtime Theatres*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29) and the distinct protections afforded by our State Constitution. In so ruling, the Court considered whether the "predominant purpose" of the challenged ordinance was to ameliorate the negative secondary effects of adult uses rather than to suppress their content, whether the ordinance was "narrowly tailored to affect only those uses shown to produce the unwanted secondary effects" and whether it provided adequate alternative locations for adult businesses within the Town (73 N.Y.2d, at 552-555, 542 N.Y.S.2d 139, 540 N.E.2d 215, citing *Renton v. Playtime Theatres*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, *supra*; *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310). With respect to the State constitutional claims in *Islip*, the Court considered whether the Town's ordinance was "justified by concerns unrelated to speech," whether it was "no broader than needed to achieve its purpose" under the State constitutional principles set forth in *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492, and, finally, whether "if the ordinance [were] enforced the total number of adult bookstores w[ould] decline or * * * fewer potential customers w[ould] be able to conveniently patronize them" (73 N.Y.2d, at 557-560, 542 N.Y.S.2d 139, 540 N.E.2d 215). It is against the template of *Islip*, that we measure plaintiffs' claims in these cases.

A. The Ordinance's Purpose Is Unrelated to Speech

The threshold issue here is whether the City's zoning amendments are purposefully directed at controlling the content of the message conveyed through adult businesses or are instead aimed at an entirely separate societal goal. The Federal constitutional analysis requires examination of the ordinance's "predominant purpose" (*see, Renton v. Playtime Theatres, supra*), while the State constitutional inquiry focuses on whether there has been "a purposeful attempt to regulate speech" (Matter of *Town of Islip v. Caviglia, supra*, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215). In the context of these facts, however, the difference in verbiage does not

significantly affect the outcome, since it is apparent from the amendments' legislative history that ameliorating the negative social consequences of proliferating adult uses was the City's *only* goal.

Before enacting the Resolution, the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City. One of these studies, prepared by the TSBID, focused on the impact of adult uses on property values and the incidence of crime in the Times Square area, in the heart of Manhattan. The TSBID identified four study blocks (those containing at least one adult enterprise) and four neighboring control blocks (those with no sex-related establishments), and then compared those data with similar statistics for the District as a whole, the wider Times Square area, all of Manhattan, and all of New York City. The data included crime statistics, property valuations and 53 formal interviews with business and real estate enterprises.

The study concluded that "the rate of increase of the total actual assessed values of the Eighth Avenue Study Blocks was less than the rate of increase for the Control Blocks along Ninth Avenue. To a lesser extent, the rate of increase of the actual total assessed value of the 42nd Street Study Block is less than that of the 42nd Street Control Block." It also determined that "[w]ithin the study blocks, non-adult businesses with adult establishments nearby showed a deflated rate of property value growth, compared to the adult establishments themselves which increased in value at a higher rate." Similarly, the underlying data showed a correlation between a concentration of adult establishments and increased crime. Over the five years preceding the study, for example, police statistics showed that there was an estimated 54% decrease in crime in the Times Square area, a decrease which was paralleled by a decrease in adult establishments. The study also found significant "patterns," notably that there were many more criminal complaints on

the study blocks than the control blocks and that the heaviest incidence of prostitution arrests occurred in the three block study area of dense concentration of adult establishments.

The Chelsea Action Coalition and Manhattan Community Board 4 prepared a second study of the effects that sex-related businesses have on other businesses in the Chelsea section of Manhattan. The study incorporated a survey of 100 Chelsea businesses located near triple-X video stores and peep shows in the neighborhood. A majority of those surveyed indicated that adult uses had a negative impact on their businesses and on the economic viability of the community as a whole.

The DCP independently surveyed six study and control areas—two in Manhattan, and one in each of the remaining boroughs. More than 80% of the real estate brokers responding to the survey reported that an adult establishment tends to depress the market value of property within 500 feet; similarly, community organizations overwhelmingly reported their perceptions that adult businesses negatively affect the community. Although the DCP acknowledged that its analysis of the hard data regarding the relationship between adult uses and urban ills did not yield conclusive results, a reading of its report as a whole indicates that the negative perception of adult enterprises held by the business community and the public itself results in disinvestment, with the concomitant deterioration in the social and economic well-being of the surrounding area.

Finally, the City additionally reviewed conclusions reached by city councils and town boards throughout the country. A 1984 study conducted for the City of Indianapolis, for example, found higher crime rates in areas containing at least one adult establishment than in similar areas without adult uses. The Indianapolis study included a nationwide survey of real estate appraisers. A large majority of the appraisers indicated that, in their professional opinions, an adult bookstore would have a negative effect on the value of both residential and commercial properties located within a

one block radius of the store. Still another example was a 1997 Los Angeles study that included a survey of real estate professionals and businesses. The survey indicated that a concentration of adult establishments adversely affected the value of surrounding commercial and residential property, made it more difficult to rent office space and retain commercial tenants in the area, and made it harder for area businesses to attract and retain customers.

In view of the legislative record upon which the City Council rested its decision to regulate adult uses, we agree with the courts below that enactment of the Amended Zoning Resolution was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose (*see, Matter of Town of Islip v. Caviglia, supra*). Plaintiffs' reliance on isolated comments from several City Council members and other City officials as evidence of an alleged improper motive to eradicate this form of expression is unavailing. A similar claim was rejected in *Islip*, where we recognized that courts will not "invalidate a municipal zoning ordinance simply because one or more legislators sought to suppress protected expression * * *. [I]t is the motive of the Legislature, not individual legislators, that is controlling" (*id.*, at 552, n. 2, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Nor is it significant that definitions of adult uses in the Amended Zoning Resolution are based in part on the content of the entertainment offered rather than exclusively on the age of the businesses' clientele (*cf., Matter of Town of Islip v. Caviglia, supra*, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215). The test under both *Islip* and *Renton* is not whether the regulated establishments are defined without reference to content but whether the ordinance's goal is unrelated to suppressing that content (73 N.Y.2d, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215, 475 U.S. at 44, 47-50, 106 S.Ct. at 927, 928-930; *see also, Young v. American Mini Theatres, supra*, at 52-54, 70-71, 96 S.Ct. at 2443-2445, 2452-2453 [plurality opn]). That test is plainly met here.

Plaintiffs' complaints about the sufficiency of the evidence on which the City Council based its decision are unpersuasive. In *Islip*, we explicitly acknowledged the value of studies from other jurisdictions (73 N.Y.2d, at 550, 553, 542 N.Y.S.2d 139, 540 N.E.2d 215). Further, it is clear from the comments of the CPC upon its approval of the amendments that the appropriate municipal officials considered the comparability and the reliability of the other jurisdictions' studies and found them satisfactory on both counts. As the CPC noted, "while none of the other studies considers a municipality which duplicates New York City in terms of variety of neighborhoods and built conditions, * * * the findings of adverse secondary effects and the conditions found in these other studies are relevant to the different neighborhoods of New York City." Plaintiffs have not offered any factual or legal basis to question that finding.

Moreover, the City did not rely exclusively on generic conclusions drawn from out-of-area studies but also conducted studies of its own. Contrary to plaintiffs' contentions, the "non-empirical," anecdotal evidence that comprised the bulk of the local studies does not render those studies worthless. In the proper context, anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects (*see, e.g., Renton v. Playtime Theatres*, 475 U.S., at 44, 106 S.Ct. at 927, *supra*; *ILQ Invs. v. City of Rochester*, 25 F.3d 1413, 1416-1417 [8th Cir.], *cert. denied* 513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d 493), particularly where, as here, the nonempirical information is extensive and indicative of a clear relationship between adult uses and urban decay.

B. The Amendments Are No Broader Than Necessary

Based upon an extensive analysis of the impacts of such establishments in the City, the amendments represent a coherent regulatory scheme designed to attack the problems associated with adult establishments. By preventing adult businesses from locating in potential residential districts

while allowing such establishments to locate in manufacturing and commercial districts, the amendments protect only those communities and community institutions that are most vulnerable to their adverse impacts.

It is now well recognized that municipalities can constitutionally bar adult establishments from, or within, a specified distance of residentially zoned areas and facilities in which families and children congregate (*see, Renton v. Playtime Theatres, supra,* at 44, 106 S.Ct. at 927; *Young v. American Mini Theatres, supra,* at 52, 96 S.Ct. at 2443-2444; *Matter of Town of Islip v. Caviglia, supra,* at 549, 563, 542 N.Y.S.2d 139, 540 N.E.2d 215). Moreover, zoning ordinances may be used to prohibit an adult business from operating within a specified distance of another in order to avoid the undesirable impacts associated with the clustering (*see, Young v. American Mini Theatres, supra,* at 52, 96 S.Ct. at 2443-2444; *Matter of Town of Islip v. Caviglia, supra,* at 563, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Relying on our State constitutional standard (*see, People ex rel. Arcara v. Cloud Books, supra,* at 558, 510 N.Y.S.2d 844, 503 N.E.2d 492), plaintiffs insist that defendants should have pursued less restrictive methods of addressing the problems caused by adult uses, such as more aggressive enforcement of existing penal and public nuisance laws, developing targeted signage requirements and limiting adult-use zoning restrictions to new establishments. However, the record here shows that the City Council reasonably determined that the listed alternatives would not adequately address problems it sought to ameliorate.

According to its report approving the proposed amendments, the CPC concluded that restricting only new adult uses "would have the effect of freezing certain locations and certain neighborhoods as the situs of adult establishments," making the reversal of existing adult-use-related blight impossible. The CPC also looked at the possibility of sign regulations, but found, based on the studies before it, that such a narrow approach would not

suffice to address such ills as reduced property values, economic stagnation, heightened crime and change in neighborhood character. As to the efficacy of more aggressive law enforcement measures, the CPC hearings revealed that such measures are generally only partially successful in stemming the criminal activity that often surrounds adult establishments.

Contrary to plaintiff's assertions in *Stringfellow's*, the City was not obligated on this record to distinguish among different types of adult uses based on the social class of their clientele or the nature of the adult entertainment they provide. Indeed, such distinctions may well have themselves run afoul of constitutional prohibitions (*see, id.*, at 558, 510 N.Y.S.2d 844, 503 N.E.2d 492). Significantly, the CPC itself found that "all of the adult uses which would be covered by the proposed regulations have been shown to produce adverse secondary effects * * *. Nothing in the studies or in the public testimony justifies distinctive treatment of any adult use." To the extent that certain individual establishments may legitimately claim that their facilities do not contribute to urban blight, their argument does not impair the constitutionality of the challenged legislation, since "[t]he validity of a statute * * * is not to be determined from its effect in a particular case, but upon its general purpose and its effect to that end" (*City of Rochester v. Gutberlett*, 211 N.Y. 309, 316, 105 N.E. 548; *see also, ILQ Invs. v. City of Rochester, supra*, at 1418).

C. Reasonable Alternative Avenues of Communication

To satisfy constitutional requirements, the City additionally must assure reasonable alternative avenues of communication (*see, Renton v. Playtime Theatres, supra*, at 53-54, 106 S.Ct. at 931-932). As this Court stated in *Islip*, there must be (1) "ample space available for adult uses after the rezoning" and (2) no showing by the challenger that enforcement of the ordinance will either substantially reduce the total number of adult outlets or significantly reduce the

accessibility of those outlets to their potential patrons (73 N.Y.2d, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Relying on a formula derived from *Renton v. Playtime Theatres (supra)*, the Federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads" (*id.*, at 53, 106 S.Ct. at 932). Under *Renton*, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry (*see, Renton v. Playtime Theatres, supra*, at 53, 106 S.Ct. at 931-932; *Woodall v. City of El Paso*, 49 F.3d 1120, 1124-1125 (5th Cir. 1995), *cert. denied* 516 U.S. 988, 116 S.Ct. 516, 133 L.Ed.2d 425; *Grand Brittain v. City of Amarillo*, 27 F.3d 1068, 1070 (5th Cir.1994); *see also, Matter of Town of Islip v. Caviglia, supra*, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215 [areas of a municipality set aside for adult uses need not be prime locations]). Rather, the inquiry is limited to the *physical* and *legal* availability of alternative sites within the municipality's borders and whether those sites are part of an actual business real estate market (*see, Topanga Press v. City of Los Angeles*, 989 F.2d 1524, 1530-1531 (9th Cir.1993), *cert. denied* 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190; *see also, Woodall v. City of El Paso, supra*; *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir.1991)).

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (*see*, 989 F.2d, at 1531). Notably, these considerations dovetail nicely with *Islip's* requirement that

there be "ample space available for adult uses after the rezoning" and no showing of a substantial reduction in the total number of adult outlets or the accessibility of those outlets to their potential patrons (73 N.Y.2d, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215). With these considerations as a backdrop, we turn now to the specific facts and contentions presented here.

Plaintiffs assert, and the municipal defendants do not dispute, that the amendments' enforcement will lead to the forced relocation of some 84% of the City's 177 adult businesses. Given the extent of the dislocation, it is incumbent upon the municipal defendants to demonstrate that sufficient alternative receptor sites are available. The City has asserted that the space available for adult uses constitutes over 11% of the City's total land area and about 4% when reduced by land encumbered by properties that are unlikely to be developed for commercial use. They further assert, based on maps prepared by City officials, that the amended zoning code leaves at least 500 potential sites for adult establishments to relocate and operate.

According to the City's submissions, the amendments will allow adult businesses to remain in districts that permit a wide mix of commercial, retail, entertainment and manufacturing uses. All of the areas in Manhattan zoned for adult use and at least 80% of the land area in the other boroughs are within a 10-minute walk from a subway line or a major bus route. These supported allegations by the City satisfy its initial burden of showing that the space designated for adult uses is adequate to accommodate the 177 existing adult businesses.

Plaintiffs, in challenging defendants' proof, rely heavily on an affidavit by Robert McLaughlin, a land-use planning and local government consultant who actually visited the sites the City identified as potential receptors. McLaughlin alleged that many of the sites are in truth unavailable because they currently house long-term occupants such as governmental and public utility facilities that are unlikely to yield to

new tenants of any sort. Other sites, according to McLaughlin, lack the necessary infrastructure or lie on wetland property that is not suitable for commercial development. Overall, McLaughlin concluded, the City's zoning plan does not allow for adequate alternative avenues for adult expression.

The McLaughlin affidavit, however, is not sufficient to raise a triable question of fact as to the availability of enough potential receptor sites. First, the affidavit's utility is undercut by McLaughlin's reliance on several assumptions that are inconsistent with controlling legal principles. McLaughlin, for example, took the position that "industrial areas" are generally unsuitable for generic commercial uses. In *Islip*, however, this Court specifically approved a local zoning ordinance that restricted adult uses to an industrial zone (73 N.Y.2d, at 548, 555, 542 N.Y.S.2d 139, 540 N.E.2d 215; *accord, Renton v. Playtime Theatres, supra*, at 53, 106 S.Ct. at 931-932). Similarly, McLaughlin eliminated undeveloped land, waterfront property, warehouse areas and parking lots as unsuitable receptors, although both this Court and the *Renton* Court expressly recognized such areas as potentially available relocation sites.

The most significant flaw in McLaughlin's affidavit, however, is the absence of any attempt to quantify his observations or to make concrete allegations as to precisely how many of the 500 potential receptor sites identified by defendants were, in his estimate, unavailable. To be sure, the affidavit lists a significant number of sites that are pragmatically unavailable because their current uses are so entrenched that they are unlikely to become part of the commercial real estate market in the foreseeable future. Included in this category are such diverse sites as those that house the northern half of Federal Plaza in Manhattan, the Clay Pit Ponds State Park Preserve in Staten Island, a New York City fire house in Brooklyn and a United Parcel Service facility in Queens. However, McLaughlin's criticisms about various individual sites do not provide an adequate counter to defendants' supported claim that within the available acreage

as a whole there are more than enough receptor sites to accommodate the existing adult entertainment industry.

Even if the criticized sites are eliminated, the absence of any quantification in the McLaughlin affidavit makes it impossible to determine whether what remains of the 500 identified sites is insufficient to accommodate the 177 adult businesses that will have to relocate once the amendments are implemented. For example, despite McLaughlin's observations that several tracts within the nonresidential zone along the far west side of Manhattan are physically or pragmatically unavailable, his affidavit does not contain the hard factual data necessary to establish that, with the elimination of these sites and with due consideration of the dispersal requirement, the City's claim that Manhattan will accommodate some 75 adult uses represents a significant overestimation. Given this shortfall, the accuracy of the City's overall calculations was not called into serious question. Similarly, the McLaughlin affidavit did not provide a basis for inferring that the result of the new zoning controls would "restrict in any significant way those wishing to [patronize adult establishments]" (*Matter of Town of Islip v. Caviglia, supra*, at 554, 542 N.Y.S.2d 139, 540 N.E.2d 215). Thus, the McLaughlin affidavit is speculative and presents no impediment to summary judgment (*see, Romano v. Stanley*, 90 N.Y.2d 444, 451-452, 661 N.Y.S.2d 589, 684 N.E.2d 19).

D. Plaintiffs' Remaining Claims

The *Amsterdam Video* and *Stringfellow's* plaintiffs argue that the amendments' enforcement will lead to an unconstitutional taking because much of the substantial investments they have made in their businesses will be lost if they are required to relocate. They further contend that the one-year amortization provision in the ordinance (Zoning Resolution §§ 52-734, 52-77) is too short to give them an opportunity to recoup their investments. These arguments are unpersuasive, however, because they fail to take into account the effect of the statutory provisions for hardship extensions. Under these provisions, a nonconforming adult establishment

may apply to the Board of Standards and Appeals for permission to continue to operate beyond the one-year amortization period set forth in the statute where it can show that it has made substantial expenditures related to the non-conformity, that such expenditures cannot be recouped within a year and that the requested extension is the minimum necessary to permit such recoupment (Zoning Resolution § 72-40). Having failed to seek relief under this provision, plaintiffs are not now in a position to complain that their constitutional due process rights have been violated (*see, Matter of Parkview Assocs. v. City of New York*, 71 N.Y.2d 274, 525 N.Y.S.2d 176, 519 N.E.2d 1372, *cert. denied* 488 U.S. 801, 109 S.Ct. 30, 102 L.Ed.2d 9; *Town of Islip v. Zalak*, 165 A.D.2d 83, 95, 566 N.Y.S.2d 306).

Equally unavailing is plaintiff's contention that the amendments are unconstitutionally vague. As a threshold matter, the *Hickerson* plaintiffs, purportedly patrons of adult establishments, lack standing to assert these claims because the amendments do not directly regulate their conduct (*see generally, Matter of Axelrod v. Sobol*, 78 N.Y.2d 112, 115, 571 N.Y.S.2d 902, 575 N.E.2d 388). With respect to the *Amsterdam Video* and *Stringfellow's* plaintiffs' vagueness claims, it should suffice to observe that the amendments' definitional provisions are sufficiently specific to provide the public with clear and reasonable notice of the type of businesses that are covered. Indeed, the Federal courts have already upheld similar zoning provisions that regulate commercial facilities devoting a "substantial portion" of their businesses to adult entertainment (*see, e.g., ILQ Invs. v. City of Rochester*, 25 F.3d 1413 (8th Cir.1994), *cert. denied* 513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d 493, *supra*).

Finally, we are not persuaded by the *Stringfellow's* plaintiff's discrete argument that the ordinance's distance requirements are too vague because they do not include a statement indicating the precise standard for measurement. To the extent that this aspect of the ordinance's provisions leaves room for confusion, the problem is procedurally remediable through administrative application and rule

making. Notably, there is no indication on the present record that the City's enforcement of the distance rules will be arbitrary or uneven.

V. Conclusion

The City's effort to address the negative secondary effects of adult establishments is not constitutionally objectionable under any of the standards set forth by the United States Supreme Court in *Renton v. Playtime Theatres (supra)* or by this Court in *Matter of Town of Islip v. Caviglia (supra)*. Accordingly, in each case the order of the Appellate Division should be affirmed, with costs.

Order affirmed, with costs.

Opinion by Judge Titone. Judges Bellacosa, Smith, Levine, Ciparick and Wesley concur. Chief Judge Kaye took no part.

Decided February 24, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RACHEL HICKERSON, *et al.*,

Plaintiffs,

– against –

THE CITY OF NEW YORK, *et al.*,

Defendants.

OPINION

Nos. 96 Civ. 2203 (MGC)

AMSTERDAM VIDEO INC., *et al.*,

Plaintiffs,

– against –

THE CITY OF NEW YORK, *et al.*,

Defendants.

96 Civ. 2204 (MGC)

Appearances:

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Gabriel Taussig,
Assistant Corporation Counsel

CEDARBAUM, Judge.

Plaintiffs in these two actions challenge the constitutionality of a recent amendment to the New York City zoning resolution which regulates the zoning of "adult establishments." Defendants, the City of New York and three City officials, removed the actions to this Court because the complaints assert claims under the United States Constitution as well as the New York State Constitution. Plaintiffs move to remand the actions, including the federal constitutional claims, to the state court. For the reasons that follow, these cases warrant abstention under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Accordingly, all of the claims arising under the New York Constitution are remanded to the Supreme Court of New York County. Remand of the federal claims is denied but the federal claims are stayed pending resolution of the state claims.

Background

The New York City Council adopted Text Amendment N 950384 ZRY (the "resolution") to the city zoning resolution on October 25, 1995. The resolution adds to the zoning resolution special provisions applicable to "adult establishments." It defines an adult establishment as "a commercial establishment where a 'substantial portion' of the establishment includes an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof." Resolution § 12-10. (The resolution is attached to the *Amsterdam* complaint and also is Exhibit A to the Declaration of Albert Fredericks dated May 16, 1996.) Adult bookstores are defined as bookstores that have as a "substantial portion" of their stock-in-trade books, magazines, photographs, films, video cassettes, or other printed matter or visual representations that are "characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified

anatomical areas.'" *Id.* § 12-10(a). An adult eating or drinking establishment is an eating or drinking establishment that "regularly features" either live performances that are "characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities'"; films or other photographic reproductions that are "characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas'"; or "employees who, as part of their employment, regularly expose to patrons 'specified anatomical areas'"; and "which is not customarily open to the general public during such features because it excludes minors by reason of age." *Id.* § 12-10(b). An adult theater is a theater that "regularly features" films or other similar photographic reproductions that are "characterized by an emphasis on the depiction or description of 'specified sexual activities' or 'specified anatomical areas'" or live performances that are "characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities,'" and "which is not customarily open to the general public during such features because it excludes minors by reason of age." *Id.* § 12-10(c). Other adult commercial establishments are facilities that "feature[ ] employees who as part of their employment, regularly expose to patrons 'specified anatomical areas' and which is not customarily open to the general public during such features because it excludes minors by reason of age." § 12-10(d).

The resolution defines "specified sexual activities" and "specified anatomical areas." *Id.* § 12-10. It does not define "substantial portion" as that term is used in the definition of adult establishment and adult bookstore, but provides that

> for the purpose of determining whether a "substantial portion" of an establishment includes an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or combination thereof, the following factors shall be considered: (1) the amount of floor area and cellar space accessible to customers and

> allocated to such uses; and (2) the amount of floor area and cellar space accessible to customers and allocated to such uses as compared to the total floor area and cellar space accessible to customers in the establishment.

Id. With respect to the definition of adult bookstores the resolution provides:

> For the purpose of determining whether a bookstore has a "substantial portion" of its stock in materials defined in paragraphs (a)(1) or (a)(2) hereof, the following factors shall be considered: (1) the amount of such stock accessible to customers as compared to the total stock accessible to customers in the establishment; and (2) the amount of floor area and cellar space accessible to customers containing such stock; and (3) the amount of floor area and cellar space accessible to customers containing such stock as compared to the total floor area and cellar space accessible to customers in the establishment.

Id. The resolution does not define the phrases "regularly features" or "characterized by an emphasis," which are used in the definitions of adult eating and drinking establishment and adult theater.

The resolution provides that adult establishments are not permitted in various zoning districts, including residential districts and some commercial and manufacturing districts. *Id.* §§ 32-01; 42-01; Fredericks Decl. ¶ 8. It provides further that adult establishments must be located at least 500 feet from a church or school or another adult establishment. Resolution §§ 32-01(b) & (c); 42-01(b) & (c). Under the resolution, one adult establishment only is permitted on a single zoning lot and no adult establishment is permitted to exceed 10,000 square feet in floor area and cellar space. *Id.* §§ 32-01(d) & (e); 42-01(d) & (e). The resolution also includes special sign regulations for adult establishments. *Id.* §§ 32-69; 42-55.

Non-conforming adult establishments must, under the resolution, terminate within one year of the effective date of the resolution. *Id.* § 52-77. The resolution includes special "amortization" provisions, however, for owners of non-conforming establishments who have not recovered substantially all of their capital investment in the establishment (or non-conforming sign). Such owners may apply to the Board of Standards and Appeals for permission to continue for additional time sufficient for the owner to recover "substantially all of the financial expenditures incurred related to the non-conformity." *Id.* § 72-40.

The resolution became effective on November 1, 1995, less than one year ago. Accordingly, no establishment has yet been required to close or move because of its provisions. Moreover, the resolution has not been construed by any court.

Plaintiffs in the first action (the "*Hickerson* plaintiffs") are Manhattan and Bronx residents who allege that they regularly patronize adult establishments. They claim that the resolution will prevent them from continuing to patronize the adult establishments they currently frequent, and will reduce significantly the number of alternative establishments available to them. The *Hickerson* plaintiffs contend that the resolution violates their rights to free expression. They assert three claims under article I section 8 of the New York Constitution and three claims under the First and Fourteenth Amendments to the United States Constitution. As their first cause of action, plaintiffs allege that the resolution intentionally restricts expression because it is directed at the "content and the time, place and manner of the messages conveyed in 'adult businesses,'" and that it is not necessary to advance a compelling interest and does not advance an interest in the least restrictive manner. (*Hickerson* Compl. ¶¶ 72-73.) As their second cause of action, the *Hickerson* plaintiffs claim that the resolution "fails to restrict expression by means 'no broader than necessary' to achieve a legitimate and important governmental objective." (*Id.* ¶ 77.) As a third cause of action plaintiffs allege that the resolution violates

article I section 8 of the New York Constitution in that it is too vague. (*Id.* ¶¶ 79-83.) As a fourth cause of action, plaintiffs assert that the resolution violates the First Amendment to the United States Constitution by failing to satisfy the requirements of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). (*Id.* ¶¶ 84-90.) As a fifth cause of action, the complaint alleges that the resolution is a content-based restriction that is not narrowly tailored to serve a compelling government interest, in violation of the First Amendment. (*Id.* ¶¶ 91-94.) Finally, as a sixth cause of action, the complaint alleges that the resolution violates the First and Fourteenth Amendments because it is too vague. (*Id.* ¶¶ 95-99.)

Plaintiffs in the second action (the "*Amsterdam* plaintiffs") are owners and operators of business establishments which they allege are adult establishments as defined by the resolution. They allege that the resolution will force them to terminate the operation of their businesses and thereby cause them significant economic harm. The *Amsterdam* plaintiffs assert fourteen causes of action, thirteen of which allege violations of the state constitution. Four causes of action elaborate different aspects of plaintiffs' claim that the resolution violates their rights to free expression under article I section 8. (*Amsterdam* Compl. ¶¶ 143-238.) Five causes of action assert that the resolution denies plaintiffs equal protection of the law in violation of article I section 11. (*Id.* ¶¶ 239-54, 274-92, 312-17.) The *Amsterdam* plaintiffs also assert two causes of action alleging that the resolution is unconstitutionally vague, (*id.* ¶¶ 270-73, 293-311), one cause of action alleging that the resolution grants an impermissible preference in favor of religion in violation of article I section 3, (*id.* ¶¶ 255-69), and one cause of action alleging that the amortization provisions of the resolution are inadequate and constitute an unconstitutional taking without just compensation in violation of article I section 7, (*id.* ¶¶ 318-31). As a fourteenth cause of action the *Amsterdam* complaint alleges that the resolution violates

plaintiffs' rights to free speech and to equal protection of the law in violation of the First and Fourteenth Amendments to the United States Constitution. (*Id.* ¶¶ 332-43.)

Plaintiffs in both cases seek declaratory and injunctive relief. The *Hickerson* plaintiffs request in addition costs and attorneys' fees.

Pullman Abstention

Abstention is an extraordinary and narrow exception to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817, 96 S.Ct. 1236, 1244, 1246, 47 L.Ed.2d 483 (1976) (citations omitted); *see also Quackenbush v. Allstate Ins. Co.*, – U.S. –, – , 116 S.Ct. 1712, 1721, 135 L.Ed.2d 1 (1996). Abstention is warranted only in "exceptional circumstances" in which the court's decision not to exercise its jurisdiction would "clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244 (quoting County of *Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959)). Federal courts are also obligated, however, to avoid deciding a federal constitutional question unless decision is "absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J. concurring). Of particular relevance here is the well-settled rule that a case should be decided first on state law grounds in order to eliminate the need to decide a federal constitutional question. *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 29 S.Ct. 451, 53 L.Ed. 753 (1909).

In *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), the plaintiffs challenged an order of the Texas Railroad Commission requiring railroad sleeping cars to be staffed by a person with the rank of Pullman conductor. All Pullman conductors were white,

and all Pullman porters were African-American. Until the challenged order, Pullman porters were in charge of sleeping cars on trains carrying only one such car. The Pullman Company and the railroads argued in federal court that the order violated Texas law and the Equal Protection, Due Process, and Commerce Clauses of the United States Constitution. Pullman porters intervened and claimed that the order unconstitutionally discriminated against them. The district court found in the plaintiffs' favor and enjoined enforcement of the order. *Id.* at 497-98, 61 S.Ct. at 644.

The Supreme Court reversed, holding that the district court should have stayed its hand until the Texas courts had ruled on the state law question. The Court explained that the porters' federal claim raised a "more than substantial" constitutional question, which the federal courts ought to avoid unless "no alternative to its adjudication is open." *Id.* at 498, 61 S.Ct. at 644. The Court then examined the Commission's power to issue the order under Texas law, and found that because the governing law was "far from clear," a decision by a federal court could not "escape being a forecast rather than a determination." *Id.* at 499, 61 S.Ct. at 645. A ruling by a federal court would amount to only a "tentative decision" which could be "displaced tomorrow by a state adjudication." *Id.* at 500, 61 S.Ct. at 645. Emphasizing that the plaintiffs appealed to the equitable powers of the federal court, the Court invoked the obligation of a court sitting in equity to exercise sound discretion in employing equitable remedies. It noted that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies." *Id.* In view of the important policies of avoiding both constitutional questions and undue interference with state governments, the Court held that abstention from the constitutional claim was required, and remanded the case to the district court with instructions to stay the action pending proceedings in the state court to determine the validity of the order under state law. *Id.* at 501-502, 61 S.Ct. at 645-646.

Under *Pullman*, "abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244 (quoting *County of Allegheny*, 360 U.S. at 189, 79 S.Ct. at 1063 (internal quotation marks omitted)). The relevant state law must be unclear to warrant abstention. *E.g. Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); *Reetz v. Bozanich*, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); *Pullman*. Abstention is not required in every case in which a plaintiff raises claims under both the federal constitution and "parallel state constitutional provisions." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 n. 4, 104 S.Ct. 2321, 2327 n. 4, 81 L.Ed.2d 186 (1984). The Supreme Court has ordered abstention in several cases, however, in which a ruling by a state court as to whether the challenged statute violated the relevant state constitution could avoid the need for the determination of a federal constitutional question. *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 95 S.Ct. 870, 43 L.Ed.2d 32 (1975); *Reetz*; *City of Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 79 S.Ct. 455, 3 L.Ed.2d 562 (1959) (per curiam); *see also Askew v. Hargrave*, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971) (per curiam) (remanding for consideration of abstention under *Pullman* abstention principles explained in *Reetz* where plaintiffs alleged that Florida statute violated federal constitution and another action pending in state court challenged same statute under state constitution).

Plaintiffs' principal challenge to the resolution is their claim that the resolution violates their rights of free expression. The New York Court of Appeals has held that the New York Constitution protects rights to free expression that the First Amendment does not protect. *See People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492 (1986). Article I section 8 provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of

that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." This language is different from that of the First Amendment, which provides: "Congress shall make no law ... abridging the freedom of speech, or of the press...." Plaintiffs raise substantial claims under the state constitution. These state constitutional claims should be determined before plaintiffs' claims under the federal constitution, because a ruling that the resolution violates the state constitution would obviate the need to decide the federal constitutional questions. *See Pullman; Ashwander; Siler.*

The state constitutional claims present questions whose resolution is "far from clear." Although the New York Court of Appeals decided in *Town of Islip v. Caviglia* that a zoning ordinance adopted by the Town of Islip to regulate adult establishments did not violate article I section 8, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215 (1989), it is uncertain how a New York court would apply that case to the resolution challenged here. The Islip ordinance governed bookstores, drive-in theaters, motels, theaters, and "peep shows" that were "not open to the public generally but exclude[d] any minor by reason of age." 73 N.Y.2d at 562-63, 542 N.Y.S.2d at 149, 540 N.E.2d at 225. Only the definitions of "adult entertainment cabaret" (which encompassed any "public or private establishment which present[ed] topless dancers, strippers, male or female impersonators or exotic dancers, or other similar entertainments and which establishment [was] customarily not open to the public generally but exclude[d] any minor by reason of age") and "massage establishment" made any reference to the subject matter of the books, films, or other materials stocked or "featured" by the adult establishment. By contrast, the resolution defines all of the affected establishments by reference to whether their wares or live performances or the activities of their employees emphasize "specified sexual activities" or "specified anatomical areas." In *Caviglia*, the Court of Appeals found that the ordinance did not require forty-three percent of adult establishments in

the community to move, and that the town rezoned some land to permit an adult bookstore to remain at its pre-ordinance location. Plaintiffs in these cases allege that the resolution will require more than eighty-four percent of existing adult establishments to move or close. The court found in *Caviglia* that substantial space in Islip was available for adult establishments, but plaintiffs here contend that insufficient alternative space is available for the large number of adult establishments in New York City. Because of these and other differences between the *Caviglia* case and these cases, the outcome of plaintiffs' state constitutional challenge is uncertain. As was true of the state law claims in *Pullman*, a federal court's judgment of the resolution's constitutionality under the state constitution would be a mere forecast rather than a determination. These claims should be decided by the state courts before any federal constitutional issue is reached.

Defendants argue that abstention is unwarranted because the federal constitutional claims do not logically depend on the state constitutional claims. (Def. Mem. at 14.) But the federal claims in *Pullman* also did not depend on the state law claim raised there. Abstention is appropriate because plaintiffs have brought claims under a provision of the state constitution that differs from the provision of the federal constitution on which they rely, the state constitutional law is not settled, and resolution of the claims under the state constitution may avoid the need for a determination of the federal constitutional questions.

In addition, plaintiffs' claims that the resolution is unconstitutionally vague depend on interpretation of a new resolution that has not been construed by any court. The meaning of phrases in the resolution such as "substantial portion" and "regularly feature" are not at once apparent. A federal court should not be the first to construe these provisions. Abstention is warranted to give the New York courts an opportunity to construe the resolution, for the courts could interpret these phrases in such a way as to change or eliminate the vagueness claims. *Greater New York*

Metro. Food Council v. McGuire, 6 F.3d 75 (2d Cir.1993) (per curiam).

For all of these reasons, these cases present exceptional circumstances which require abstention. The state claims are remanded to state court, and the federal claims are stayed until conclusion of the state litigation.

Burford Abstention, Remand, and Supplemental Jurisdiction

As explained above, plaintiffs' state constitutional claims are remanded and the federal claims stayed. Plaintiffs, however, want more. They seek to have their federal constitutional claims adjudicated by a state court. Plaintiffs argue that the doctrine of *Burford* abstention and 28 U.S.C. § 1441(c) both authorize remand of the claims arising under the Constitution of the United States. In addition, the *Amsterdam* plaintiffs suggest that remand is authorized by 28 U.S.C. § 1367.

Only extraordinary circumstances justify a federal court's refusal to decide claims that fall within its original jurisdiction. The court's responsibility to exercise jurisdiction is especially strong when, as here, substantial claims under the federal constitution are presented. Plaintiffs argue that this obligation is limited to the duty to protect a plaintiff's right to have federal constitutional claims adjudicated by a federal court. Plaintiffs reject defendants' correlative right to a federal forum.

Plaintiffs are the masters of their complaints, and these plaintiffs could have assured themselves a state forum by bringing only claims arising under state law. Plaintiffs are, of course, entitled to raise any claim for which they have a good faith basis. But if plaintiffs choose to assert claims under the constitution of the United States, defendants are entitled to remove the case to federal court. 28 U.S.C. § 1441(a) (1994).

The City of New York and its officials are entitled to have their responsibilities under the federal constitution determined by a federal court. Although I have held that exceptional circumstances are present which justify staying the federal claims until the state courts have decided the state constitutional claims, the circumstances that would justify a decision entirely to relinquish the federal claims do not exist. That is, the circumstances justify delaying decision on the federal claims, but not complete abdication. For the reasons explained below, the authority on which plaintiffs rely does not provide a basis for remand of the federal constitutional claims.

1. Burford Abstention

In *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), the Supreme Court held that the district court, as a matter of sound equitable discretion, should have declined to exercise jurisdiction over the plaintiff's due process challenge to an order of the Texas Railroad Commission. The Commission's order, which granted the defendant the right to drill certain oil wells, was issued pursuant to a statute empowering the Commission to regulate oil production in Texas. Because of the detailed, comprehensive regulatory scheme involved, the Court held that the district court should have abstained. The Court noted that if federal courts were available for review of the Commission's orders, "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy" would inevitably result, *id.* at 327, 63 S.Ct. at 1104, and that oil production involved "basic problems of Texas policy," *id.* at 332, 63 S.Ct. at 1106. The Court described the Texas courts as "working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry." *Id.* at 326, 63 S.Ct. at 1103. The Court concluded that such challenges should be left to the state courts to be handled as "one more item in a continuous series of adjustments." *Id.* at 332, 63 S.Ct. at 1106 (citation omitted).

The Court has since described the doctrine of *Burford* abstention as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361, 109 S.Ct. 2506, 2514, 105 L.Ed.2d 298 (1989) (quoting *Colorado River*). The Second Circuit has held that "the aim of *Burford* abstention is to avoid resolving difficult state law issues involving important public policies or avoid interfering with state efforts to maintain a coherent policy in an area of comprehensive regulation or administration." *Bethphage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239, 1243 (2d Cir.1992) (citations and internal quotation marks omitted).

Plaintiffs argue that *Burford* abstention is warranted because "the question of zoning needs is an issue of local land use policy and, therefore, is more properly considered in the first instance by the state court." (*Hickerson* Pls.Mem. at 7, *Amsterdam* Pls.Mem. at 19 (quoting *Rose v. Village of Upper Nyack*, 669 F.Supp. 654, 656 (S.D.N.Y.1987)).) Plaintiffs contend that decision by a federal court would disrupt the City's efforts to establish a coherent zoning scheme for adult establishments.

Burford abstention cannot be justified in the cases before the Court. They are not challenges to discrete orders under a comprehensive regulatory scheme as in *Burford*. If decision of the federal constitutional claims becomes necessary, a federal court will not be required to resolve difficult

questions of state law, because plaintiffs attack an entire scheme under the Constitution and the state courts will have already construed the resolution. Decision by a federal court also would not disrupt the City's efforts to establish a coherent policy. Indeed, it would make little sense to hold that federal court adjudication would unduly interfere with local policy when it is the local government defendants who brought the case to federal court, and who seek to keep it here. *Burford* abstention is not appropriate.

2. Remand – 28 U.S.C. § 1441(c)

Plaintiffs contend that 28 U.S.C. § 1441(c) authorizes remand of these actions in their entireties, including the federal claims. Section 1441(c) was amended in 1990 by the Judicial Improvements Act. Prior to its amendment, this section provided:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c) (1988). The provision now reads as follows:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters in which State law predominates.

28 U.S.C. § 1441(c) (1994).

Plaintiffs rely on the last clause of the amended provision, which now authorizes remand of all "matters" in which state law predominates. Plaintiffs contend that Congress changed the language to permit district courts to remand an entire case that includes a federal claim when state law predominates in the case as a whole.

Plaintiffs' argument is not persuasive. First, section 1441(c) does not apply to these cases because plaintiffs' federal claims are not "separate and independent" from their state law claims. Prior to 1990, the Supreme Court held that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14, 71 S.Ct. 534, 540, 95 L.Ed. 702 (1951). The Court observed in *Carnegie-Mellon University v. Cohill* that federal claims are not separate and independent from pendent claims such as plaintiffs' state constitutional claims. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 354, 108 S.Ct. 614, 621, 98 L.Ed.2d 720 (1988). Congress left this "separate and independent" language unchanged when it amended the statute, and therefore the provision continues to be inapplicable to cases comprised of federal question claims and pendent state claims. *Borough of West Mifflin v. Lancaster*, 45 F.3d 780 (3d Cir.1995).

Second, even in those cases to which it applies, section 1441(c) does not authorize remand of federal claims. The sparse legislative history relating to the phrase on which plaintiffs rely provides little guidance except that it contains no indication of an intention to effect a radical change in federal question jurisdiction. It is not clear what Congress meant by "matters in which State law predominates." Congress was aware, however, of the federal courts' strong view of their obligation to exercise jurisdiction over federal claims properly before them, and it is extremely unlikely that Congress would have used such ambiguous language to accomplish so significant a change in federal jurisdiction. Some district court decisions, on which plaintiffs rely, have

concluded that the revised provision does authorize remand of entire cases including federal claims. *Moralez v. Meat Cutters Local 539*, 778 F.Supp. 368 (E.D.Mich.1991); Alexander by *Alexander v. Goldome Credit Corp.*, 772 F.Supp. 1217 (M.D.Ala.1991); *Moore v. DeBiase*, 766 F.Supp. 1311 (D.N.J.1991); *Holland v. World Omni Leasing*, 764 F.Supp. 1442 (N.D.Ala.1991); *Martin v. Drummond Coal Co.*, 756 F.Supp. 524 (N.D.Ala.1991). The better view, however, is that it does not. *See Buchner v. Federal Deposit Ins. Corp.*, 981 F.2d 816 (5th Cir.1993); *Kabealo v. Davis*, 829 F.Supp. 923 (S.D.Ohio 1993), *aff'd*, 72 F.3d 129 (6th Cir.1995). History, language, and logic compel the conclusion that under section 1441(c), the phrase "matters in which State law predominates" does not encompass federal claims.

Finally, even if I had discretion under this statute to remand plaintiffs' federal constitutional claims, I would not do so. Plaintiffs have raised claims under the First Amendment; their allegations that the resolution also violates the state constitution do not diminish the importance of the federal constitutional issues. A "matter" that includes a substantial federal constitutional claim cannot be a matter in which state law predominates.

3. Supplemental Jurisdiction – 28 U.S.C. § 1367

The *Amsterdam* plaintiffs appear to contend that 28 U.S.C. § 1367 authorizes remand of the federal as well as the state law claims in these actions. Also enacted as part of the Judicial Improvements Act of 1990, section 1367 codifies the doctrines of pendent and ancillary jurisdiction, now called "supplemental" jurisdiction. Subsection (a) of the statute provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such

> original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (1994). Subsection (c) provides that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a)" under certain circumstances. § 1367(c). Nothing in section 1367 authorizes a district court to dismiss or remand any claim over which the district court has original jurisdiction, including claims arising under the United States Constitution.

For all of the reasons stated above, plaintiffs' motions to remand the claims arising under the United States Constitution are denied.

Motions for Intervention

Forty-eight individuals and organizations move to intervene as defendants in these actions. In light of my decision to abstain, the motions for intervention are denied as premature, subject to renewal when these cases are reopened following the conclusion of the state proceedings and without prejudice to motions for intervention in the state proceedings.

Conclusion

For the foregoing reasons, the motions to remand are granted in part and denied in part. All claims arising under the Constitution of New York are remanded to the Supreme Court of New York County. All claims arising under the Constitution of the United States are stayed pending determination of the state claims in state court. The motions for intervention are denied without prejudice.

SO ORDERED.

Dated: New York, New York
June 27, 1996

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

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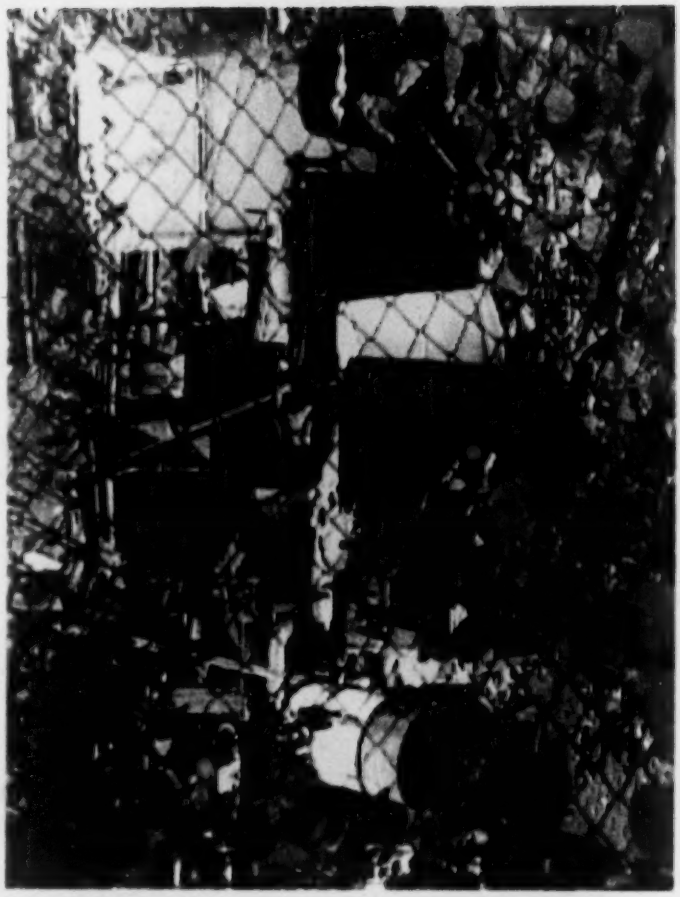

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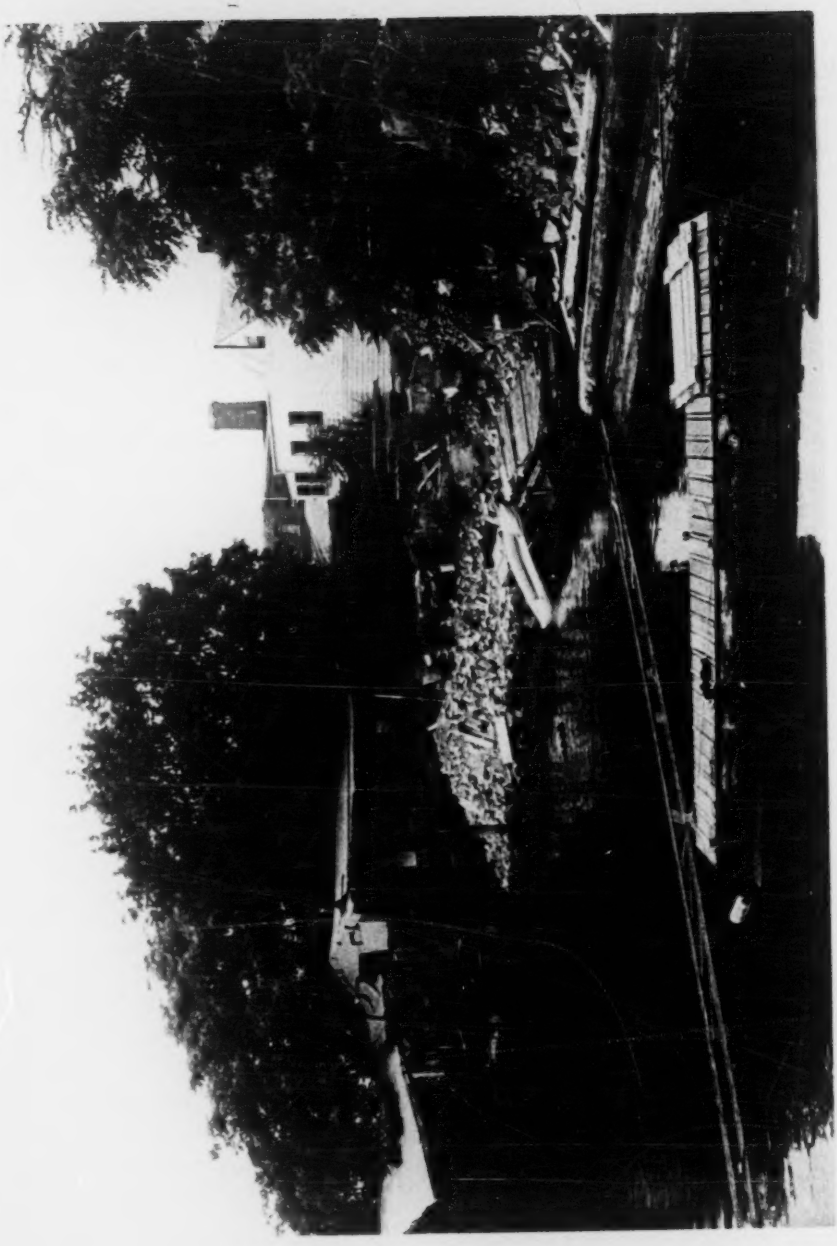

Supreme Court, U.S.
FILED
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Nos. 98-569, 98-574

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

AMSTERDAM VIDEO INC., *et al.*,

Petitioners,

-v.-

THE CITY OF NEW YORK, *et al.*,

Respondents.

RACHEL HICKERSON, DEREK JONES, TY McCONNELL, and ELLIOT STAMLER,

Petitioners,

-v.-

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITY RESPONDENTS' BRIEF IN OPPOSITION

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December 1, 1998

COUNTER-QUESTIONS PRESENTED

1. Pursuant to the full faith and credit statute, 28 U.S.C. § 1738, and this Court's precedent, was the Second Circuit's affirmance of the denial of a preliminary injunction proper on the grounds of the application of issue preclusion or collateral estoppel, where there was extensive litigation in New York state court, plaintiffs' chosen forum, culminating in a final determination by New York's highest court, the New York Court of Appeals, in *Stringfellow's v. City of New York*, 91 N.Y.2d 382 (1998), which made findings of fact and law, and employed the standards set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), in upholding the City of New York's adult use zoning ordinance?

2. In any event, given the controlling precedent in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opin.), was the denial of a preliminary injunction proper where the challenged adult use zoning ordinance is facially valid under the First Amendment of the United States Constitution given that it is content-neutral, narrowly tailored to serve important governmental interests, and provides reasonable alternative means of communication?

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COUNTER-STATEMENT OF THE CASE

Respondents, the City of New York, *et al.* ("the City"), respectfully request that this Court deny the petitions by the separate petitioners, Amsterdam Video, Inc., *et al.* ("*Amsterdam*") and Rachel Hickerson, *et al.* ("*Hickerson*") (collectively, "petitioners"), for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 3, 1998 (A-3-32).[1] The Second Circuit affirmed a judgment of the District Court for the Southern District of New York, which denied a preliminary injunction against enforcement of the City's adult use zoning ordinance based on application of the full faith and credit statute, 28 U.S.C. § 1738, and the law of issue preclusion or collateral estoppel, given the New York State courts' rejection of petitioners' claims. *Hickerson v. City of New York*, 146 F.3d 99 (2d Cir.), *aff'g*, 997 F. Supp. 418 (S.D.N.Y.), *stay denied sub nom. Amsterdam Video v. City of New York*, 119 S. Ct. 4 (1998) (A-3-32, A-33-44).

In relevant part, following extensive litigation, the State's highest court, the New York Court of Appeals, rendered a final determination upholding the City's adult use zoning ordinance, including findings of fact and law. *Stringfellow's v. City of New York*, 91 N.Y.2d 382 (1998) ("*Stringfellow's*") (A-45-67). In rejecting petitioners' free expression claims under the New York Constitution, it applied the standard for validity of an adult use zoning ordinance set forth by this Court

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[1] To avoid unnecessary duplication, numbers and letters in parentheses preceded by "A-_." refer to the Appendix to the Petition for a Writ of Certiorari filed by the *Amsterdam* petitioners, while the separate *Hickerson* petitioners' Appendix will be referred to as "_a," only for material not contained in the *Amsterdam* Appendix. Numbers in parentheses preceded by the letters "JA" or "SA" refer to pages in the Joint Appendix ("JA___") or the Supplemental Appendix ("SA __") in the Second Circuit.

in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) ("*Renton*"), which is, in all material respects, identical to the New York constitutional standard. Thus, upon review of the extensive legislative record, the State courts found that the ordinance is content-neutral, imposes a measured set of land use restrictions on those adult establishments that have consistently been shown to produce negative secondary impacts, and that there are ample reasonable alternative avenues of communication.

Given the identity of the federal and state standards, the Circuit correctly held that, under the full faith and credit statute and governing precedent, including *Allen v. McCurry*, 449 U.S. 90 (1980) and *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), the New York courts' findings are dispositive of the federal constitutional issue based upon well-settled principles of issue preclusion or collateral estoppel.

Background of the Legislation.

The background facts are summarized in the Circuit's opinion (A-8-9, 12-13). Further discussions are contained in the State court opinions in *Stringfellow's* (A-45-67, 95-122a; *post*, pp. 11-15) and the Circuit's opinion upholding the ordinance in *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir.), *cert. denied*, 119 S. Ct. 54 (1998) ("*Buzzetti*").

The extensive legislative record leading up to the passage of the Amendment to the New York City Zoning Resolution governing adult use establishments illustrates its reasonableness (JA931-94). In brief, in recent years, growing concerns were expressed by City residents and their elected officials as to the significant proliferation of sexually-oriented adult entertainment establishments and their adverse community impacts,

particularly in residential areas. In response, the City's land use planning bodies, the Department of City Planning ("DCP") and the City Planning Commission ("CPC"), conducted a thorough analysis of whether the City should adopt zoning regulations of adult establishments (JA916-17, SA6-7).[2]

The DCP's Adult Entertainment Study ("the DCP Study"), completed in the fall of 1994, contains a survey of adult use studies performed by many other municipalities, as well as prior City studies and DCP's own survey of selected study areas (JA918, SA8-15). The DCP Study concluded that adult entertainment constituted a serious, growing problem and recommended restrictions (JA918). As detailed in *Buzzetti,* the DCP Study (*id.*, 140 F.3d at 136):

> noted that studies from other cities had documented numerous "negative secondary impacts of such establishments, including "increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life." DCP Study at 67. These effects were consistent with the experience of those areas of New York City marked by high concentrations of adult entertainment establishments . . . Even in areas where adult establishments were not heavily concentrated,

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[2] Such establishments include adult book and video stores, which often provide booths for on-premises viewing, adult theaters, which may offer movies or live entertainment, and topless or nude bars. Once found predominantly in Times Square and a few other areas, adult establishments more recently opened and proliferated in neighborhoods where they had not previously been located, including numerous triple-X video stores and nude bars in or near residential neighborhoods in the City, such as Chelsea, Sunset Park, Sunnyside and Forest Hills (JA916, SA6-7, 19).

residents, businesses, and community leaders feared the consequences of possible future proliferation ....

After the City Council enacted a one-year interim zoning moratorium in 1994, and based upon the DCP Study and thorough public hearings, the CPC issued a detailed report and approved the permanent comprehensive Zoning Amendment (SA15-20; JA971; *Buzzetti*, 140 F.3d at 136). After further public hearings, on October 25, 1995, the City Council approved the Amendment, effective that date (SA21).

The Permanent Adult Use Zoning Amendment.

The permanent adult use Zoning Amendment ("the Amendment") does not forbid the operation of any category of business, but instead restricts the zoning areas in which an "adult establishment" may be operated (124-34a; JA918-19, 120-41). An adult establishment is defined, *inter alia*, as a commercial establishment which is: an "adult book store," an "adult eating and drinking establishment," an "adult theater," or "other adult commercial establishment." N.Y.C. Zoning Resolution ("ZR"), § 12-10. These establishments "regularly feature" or devote a "substantial portion" of their stock-in-trade to entertainment or material that is "characterized by an emphasis on" "specified anatomical areas" or "specified sexual activities," which terms are also defined in § 12-10 (SA21). Identical or similar definitions are used in many of the adult use zoning ordinances throughout the country (SA21-22).

The centerpiece of the Amendment is a set of locational restrictions and anti-concentration provisions that are designed to shield the City's residential neighborhoods, and the facilities and commercial areas that serve them, from the negative impacts produced by adult uses (JA919, SA23). Even before

these regulations were adopted, the general regulatory scheme embodied in the Zoning Resolution prohibited new commercial development in residentially-zoned districts (*id.*). Under the Amendment, adult uses are barred from certain districts zoned for commercial and manufacturing uses, but which also permit new residential development (ZR, §§ 32-01[a], 42-01[a]).

Adult establishments continue to be allowed in all high-density commercial and virtually all manufacturing districts that are mapped throughout the City and in which a wide variety of retail, entertainment and other commercial uses are permitted (ZR, §§ 32-01[b], 42-01[b], SA24-25, *post*, pp. 8-9). In these districts, however, they must be located at least 500 feet from any school or house of worship and from most zoning districts in which new residential uses are allowed (*id.*). To prevent concentration, a new adult use must be located at least 500 feet from any other adult use (ZR, §§ 32-01[c], 42-01[c]).[3]

Background of the Actions.

These parallel actions were commenced in New York Supreme Court in February 1996 (JA20, 197, 921). The *Amsterdam* plaintiffs are owners or operators of adult establishments, while the *Hickerson* plaintiffs are customers

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[3] Aside from some exceptions with respect to certain pre-existing adult uses (ZR §§ 32-01[b].[f]. 42-01[b].[f]), the Amendment generally required existing non-conforming adult establishments to come into conformity or terminate within one year of the effective date, *i.e.*, by October 26, 1996 (*id.*, §§ 52-734, 52-77; JA496-97). It also provided that, upon a timely application with the requisite showing by an owner of a non-conforming adult establishment, the City's Board of Standards and Appeals could allow it to be maintained for more than one year from the effective date (ZR § 72-40; SA25-27). Neither petitioners or any other business chose to make a proper and timely application (A-65-66).

thereof (JA921-22).[4] Both complaints asserts deprivation of the rights of free expression under the State and Federal Constitutions, with 13 of the 14 causes of action in the *Amsterdam* complaint alleging purely State constitutional violations (JA20-112, 113-15; *see also* JA172-98).

In March 1996, defendants removed the actions to District Court pursuant to 28 U.S.C. § 1441 (JA15-19, 167-71, 922).

Vigorously objecting, plaintiffs sought a remand to State court (JA209-34, 254-56). They argued that State court was their chosen forum to litigate all their claims, both state and federal, that the state law claims predominated, and that the New York Constitution affords expressive activity greater protection than the Federal Constitution (JA228, ¶¶ 47-48).

For example, the *Amsterdam* plaintiffs' counsel's supporting affirmation states that the federal issue is "minor and subordinate (JA228 ¶ 48), and that their state constitutional claims "predominate[d]," while their First Amendment claim was a mere "adjunct" or "supplement" (JA227, quoted by Circuit at A-24-25). Their legal memorandum also stated that: "No credible claim can be made that a federal court is in a better position than the New York State court to inquire into

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[4] The named City defendants are the City of New York, Mayor Rudolph W. Giuliani, Gaston Silva, Commissioner of the Department of Buildings, and Joseph B. Rose, the CPC Chairperson and DCP Director (JA46-47, 174-76). The separate intervenors-defendants are the Times Square Business Improvement District and the Center for the Community Interest, among other community groups (JA1015, 1237).

the adequacy and suitability of [the alternative] sites" (*Amst.* Mem., 4/96, p. 20).[5]

On June 27, 1996, the District Court remanded all the state law claims, retaining jurisdiction over the federal claims, but staying adjudication thereof. *Hickerson v. City of New York*, 932 F. Supp. 550 (S.D.N.Y. 1996) (A-68-86).

The Extensive State Court Litigation.

Following the remand, the *Amsterdam* and *Hickerson* actions were assigned to Justice Marylin G. Diamond and were informally consolidated with a third action challenging the Amendment, *Stringfellow's v. City of New York* (JA922).

In July 1996, following a preliminary injunction motion by the *Stringfellow's* plaintiffs, and upon the City's indication that it would cross-move for summary judgment upholding the *prima facie* validity of the law, all the parties and the Court agreed upon a briefing schedule to resolve the matter by October 26, 1996, the effective date for compliance after the one-year amortization period (*Stringfellow's* Appen. at A1673-74). In August 1996, in accord with the schedule, defendants cross-moved for summary judgment declaring the Amendment valid (JA922-23). Plaintiffs then filed papers to reserve their federal claims under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) (JA309-15).

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[5] So too, the *Hickerson* petitioners stated: "Here, the plaintiffs' principal claim is that the New York City zoning ordinance violates . . . the New York Constitution," reducing to a footnote that they "also" asserted federal claims (*Hick.* Mem., 4/16/96, p. 9 & n.3), and that they should be able to litigate their claims, which "should be decided by the State courts," in "their chosen forum" (*Hick.* 5/21/96 Reply Mem., pp. 3, 4).

The City submitted supporting affidavits by several City Planning officials: Joseph B. Rose, CPC Chairperson and DCP Director (SA4-29), William Bernstein, DCP First Deputy Executive Director (SA30-38), and Andrew Lynn, DCP Executive Director (SA39-43). It also submitted virtually the entire several thousand page legislative record before the City Council (which included the DCP Study and CPC Report), and a series of detailed maps (JA923).

In addition to the legislative background (*ante*, pp. 2-5), these affidavits detailed how the Amendment provides ample access to adult entertainment and materials (JA920-21, SA27-28). Adult establishments may operate in all high density commercial and virtually all manufacturing zoning districts, that are mapped throughout the City, and which areas permit a broad range of retail, amusement, recreational and other commercial and industrial uses (112-14a; SA31-38).[6] These areas include portions of midtown Manhattan, a large swath along its West Side, Sunset Park, Brooklyn, northern Astoria and other parts of Queens, the South Bronx and the western shore of Staten Island (SA32-38).

These districts are well-served by major highways, thoroughfares and mass transit, and DCP showed that all of the permissible Manhattan areas, and at least 80% of such areas in the other boroughs, are within a 10-minute walk of a rapid transit line or major bus route (SA32).

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[6] As the State Supreme Court found, the in-depth examination of Manhattan, including six districts below 59th Street, where about 100 adult establishments were operating, and where 75 may remain, is "especially compelling" (112-14a; SA33-34). The Court also found that that "specific analysis belies" plaintiffs' bald allegations of being forced into outer boroughs (113a).

In addition, DCP calculated that the areas in which adult uses are permitted are more than 11% of the City's total land area, and about 4% of the area when reduced by certain properties unlikely to be developed for commercial use (SA28, JA989). DCP estimated that the Amendment allows for the operation of approximately 500 adult establishments, each of which may have up to 10,000 square feet of usable floor area (SA28, JA989).[7] Given that about 177 adult establishments were operating in the City and the fact that the vast majority of those establishments occupy far less than 10,000 square feet, the Amendment not only permitted all of the existing adult establishments to continue to operate, either at their current sites or new locations, but also accommodated a significant expansion of the adult use market (SA28-29, 38, JA950-51).

The City also demonstrated that its manufacturing districts are very suitable for new commercial development and that the City encourages a mix of commercial and industrial uses and activity therein (SA40-41). As a general matter of land use policy, the City's Zoning Resolution permits almost all commercial uses -- retail, office, service and entertainment -- in manufacturing districts, and a significant amount of commercial activity takes place in these districts (SA40-41). These districts contain an ample amount of property available at affordable prices, with about 22% of the property characterized as vacant land or buildings (SA41-42).

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[7] This estimate takes into account the locational restrictions, as well as discounting as potential sites certain properties that are unlikely to be developed for any commercial use, referred to as "encumbered" areas (SA28). These areas include those occupied with public utilities or oil storage facilities; property designated as wetlands by the State Department of Environmental Conservation; publicly-owned vacant property of more than 10,000 square feet; areas under active consideration for rezoning that would prohibit adult uses; and sites fronting on built roadways (SA28).

Even though a summary judgment motion ordinarily stays discovery, N.Y. C.P.L.R. §§ 3212(a), 3214(b), particularly in facial legislative challenges, nonetheless, at plaintiffs' urging, the State Court allowed some discovery to be conducted prior to decision, while continuing to deny indefinite extensions to the agreed schedule. At the Court's direction, defendants, *inter alia*, answered interrogatories and provided pre-enactment maps that showed the areas where adult uses are permitted when encumbered areas are eliminated (JA974-75, SA42-43).

In addition, while the Court had entered an order on August 22, 1996 denying further discovery without leave, thereafter, upon the *Hickerson* plaintiffs' application, it granted leave and directed defendants to produce for deposition a person familiar with DCP's calculation of the total number of adult establishments permitted. On September 3, 1996, defendants produced Marilyn Mammano, DCP's Director of Zoning and Urban Design (JA974-75, 849-910), who supervised the staff who actually performed the calculation, which was done prior to enactment (JA872, p.87).[8]

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[8] Ms. Mammano explained that DCP had prepared maps of each borough, which showed the permissible areas, the locations of "sensitive receptors," such as schools and churches, and the properties that were unlikely to be developed for any commercial uses, *i.e.*, the "encumbered" areas (JA851-95, SA42-43). The maps were prepared by computer, using data from various government sources and the results of field surveys by DCP staff, who had personally visited many of the areas (JA861, p. 46, SA42-43). Using those maps and a scaled measuring device, DCP staff measured 500 foot intervals along the street network within the areas where adult uses were to be permitted, but excluding the encumbered areas and areas surrounding sensitive receptors. DCP estimated, conservatively, that about 500 adult establishments are allowed under the Amendment (JA973, p. 92; JA861-62, pp. 43-47; JA869, p. 75; JA956-57).

Notably, in response to defendants' motions, both the *Amsterdam* and *Stringfellow's* plaintiffs cross-moved for summary judgment (JA974). All plaintiffs submitted extensive opposing affidavits, including a lengthy 106-page affidavit of R. Bruce McLaughlin, a Florida-based land use planning consultant (A385-491). That affidavit consisted largely of broad conclusory allegations and legal argument about, *inter alia*, the alleged unsuitability of manufacturing districts for commercial use, as well as the alleged unsuitability of such areas as vacant land, parking lots, or property with existent leases (*id.*; *see* JA990-92).[9]

The Lower State Court Opinions.

By lengthy, well-reasoned opinion entered October 23, 1996, the State Supreme Court granted the City's cross-motion for summary judgment upholding the Amendment and dismissed the three actions. *Stringfellow's v. City of New York*, 171 Misc. 2d 376 (Sup. Ct., N.Y. Co. 1996) (95-122a). It upheld its validity under the New York Constitution based on *Town of Islip v. Caviglia*, 73 N.Y.2d 544 (1989) ("*Islip*"), which used standards parallel to *Renton* (102-105a).

First, the Court found that the voluminous legislative record provided ample evidence that adult establishments tend

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[9] Plaintiffs claimed insufficient time to respond, ignoring the agreed-upon schedule and the fact that other potentially relevant information was not within defendants' exclusive custody, such as public transit maps (JA958, 118-19a). As the State Courts also stressed: 1) plaintiffs commenced the actions some six months earlier and their counsel had actively participated in the long, open public review process preceding passage in October 1995; 2) their expert McLaughlin had familiarity with that process and had done a lengthy 198-page predicate study in August 1995 based upon a draft of the Amendment (A-63-65; 117a; JA492-690).

to produce certain negative impacts in the communities that surround them, and that the City's adult regulations were designed, not to suppress expression, but to address these legitimate land use concerns (106-10a). Thus, they were no broader than necessary to achieve their purposes (110-11a).

The Court also held that the regulations provided reasonable alternative avenues of communication or ample space throughout the City for adult establishments, citing both *Renton* and *Islip* (111-15a). The Court found that defendants' evidence, particularly the City Planning officials' affidavits, established, among other things, that: 1) adult establishments are permitted in a number of commercial and manufacturing zoning districts which permit a wide range of retail, recreational, entertainment and other commercial uses; 2) the districts are well-served by both mass transit and highways, with generally at most a 10-minute walk to a bus or subway line; and 3) incorporating all of the locational and separation requirements, about 500 adult establishments may lawfully operate in the City (far more than the 147 of 177 total establishments which would have to relocate) (112-15a).

Furthermore, plaintiffs did not come forward with legally sufficient countervailing evidence (115-19a). Having closely examined the affidavit of their expert McLaughlin, which contended that the number of available sites was much smaller than defendants' estimate, the Court found McLaughlin's methodology to be "fatally flawed" because he unjustifiably eliminated numerous sites based on such factors as use as a warehouse or parking lot, the undeveloped state of the site, presence of a long-term lessee, and lease clauses prohibiting adult uses (116-17a). Noting that the exclusion of such factors has been repeatedly rejected by state and federal courts,

including this Court in *Renton*, the State Court held that plaintiffs failed to rebut defendants' evidence, stating (117a):

> Although 10 months have passed since McLaughlin states he obtained zoning maps maintained by the DCP [*see* JA401, ¶ 37], he claims that he cannot estimate the acreage size of the permissible zones because of lack of time. He also fails to offer his own number of potential relocation sites under either the City's methodology or his own methodology to rebut the City's calculation.[10]

The Court concluded that plaintiffs failed to raise any issue of fact requiring a trial and that defendants were entitled to summary judgment (119a). After having allowed various discovery, the Court rejected requests for additional discovery in this facial challenge, finding the record "thorough, extensive and comprehensive" and that there was no showing that necessary information was in defendants' exclusive custody (*id.*). Thereafter, the Appellate Division unanimously affirmed, citing *Islip* and *Renton*. *Stringfellow's v. City of New York*, 241 A.D.2d 360 (1st Dept. 1997) (92-94a).

The New York Court of Appeals' Opinion.

On February 24, 1998, the Court of Appeals unanimously affirmed the order below, agreeing with the lower courts that the Amendment comports with state and federal constitutional standards governing adult uses, which are substantially the

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[10] The Court rejected the contention that the estimate was invalid because it was generated by computer and not by inspection of all of the actual sites, also noting that it was based on conservative measurements (118a).

same under *Islip* and *Renton*. *Stringfellow's v. City of New York*, 91 N.Y.2d 382 (1998) (A-45-67).[11]

Upon thorough review, the Court of Appeals held: "In view of the legislative record upon which the City Council rested its decision . . ., we agree with the courts below that enactment of the Amended Zoning Resolution was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose" (A-58). It also found that the Amendment is no broader than necessary and is "a coherent regulatory scheme" which "protect[s] only those communities and community institutions that are most vulnerable to the adverse impacts of adult uses" (A-59-60).

Finally, employing the *Renton* standards, the Court of Appeals agreed that the Amendment left reasonable alternative avenues of communication available (A-61-65). The Court stated (A-62-63, quoted in Circuit opinion at A-15-16):

> Relying on a formula derived from *City of Renton v. Playtime Theatres*..., the federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses "in all stages of development from raw land to developed, industrial warehouse, office and shopping space that

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[11] Plaintiffs' massive briefs totalled over 300 pages and fully discussed their preference to litigate in State court as their chosen forum (SA44-386). They argued that New York courts are more liberal on free speech than the federal courts (SA63, 76, 97), that reliance on *Renton* was "misplaced" and "unwarranted" (SA99, n.18, SA100, 126), and that *Renton* is not the law in New York (SA258). They also argued that they did not receive adequate discovery or a trial (SA226-40; 377-84, 119-36).

is criss-crossed by freeways, highways and roads" (*id.*, at 53-54). Under *Renton*, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry [citations omitted]. Rather, the inquiry is limited to the *physical* and *legal* availability of alternative sites within the municipality's borders and whether those cites are part of an actual business real estate market (*see*, *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1530-31 [(9th Cir. 1993)], cert [.] denied [,] 511 U.S. 1030...[(1994)]; . . .).

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (*see* [*Topanga*], 989 F.2d, at 1531).

The Court found that the evidence submitted by defendants established that, *inter alia*, under the regulations, at least 500 adult establishments will be able to operate within zoning districts "that permit a wide mix of commercial, retail, entertainment and manufacturing uses" (A-63). The Court found that the opposition's submissions did not contain "the hard factual data" necessary to refute any of that evidence and: "[g]iven this shortfall, the accuracy of the City's overall calculations was not called into serious question" (A-65).

The Federal Motions for Injunctive Relief.

Following the Court of Appeals' decision, plaintiffs sought a preliminary injunction in District Court enjoining defendants from enforcement. Their new affidavits included one from their expert McLaughlin, whose State court affidavit had failed to quantify the number of available sites. Within the five-day period given, he opined, for the first time, that there were only 90 available sites after excluding "unsuitable" sites (JA1019-75). Also submitted were a videotape and "transcript" of Mayor Giuliani's remarks at a February 24, 1998 press conference after the Court of Appeals' decision (JA911-14).

In their legal memoranda, plaintiffs acknowledged that the State courts made certain findings, including that: 1) the property where adult establishments may operate under the Amendment constitutes over 11% of the City's total land area and about 4% when reduced by encumbered properties that are unlikely to be developed for commercial use; 2) there are at least 500 potential sites for adult establishments to relocate and operate; and 3) all of the areas in Manhattan zoned for adult use and at least 80% of the land area in the other boroughs are within a 10-minute walk from a subway line or a major bus route (A-63; *Hick.* Mem., pp. 12-13; *Amst.* Mem., p.17, n.7). In the Circuit, they again acknowledged these findings, including that more than 500 potential sites exist (*Amst.* Br., p.35, n.15; *Hick.* Br., pp. 5, 7).

The City defendants opposed the motions by declarations of Albert G. Fredericks (JA915-30, SA1-3), with annexed exhibits including the State opinions (JA931-1014), the State court affidavits by City Planning officials (SA4-43), and plaintiffs' New York Court of Appeals' briefs (SA44-386). The City urged that there was no likelihood of success based

on the application of collateral estoppel and, separately, on the merits under *Renton* (JA927-30).[12]

THE DISTRICT COURT OPINION

On March 6, 1998, after ample oral argument, the District Court denied a preliminary injunction (A-33-44). In a thorough opinion, it held that plaintiffs did not show a likelihood of success on the merits, a showing "particularly appropriate where a municipal regulation has been carefully examined by all [the State courts], including the highest court, and its validity has been upheld under a state constitution that provides broad protection for individual rights" (A-34-35).

After reviewing the litigation history (A-35-39), the Court held that the issues presented were precluded by the factual findings and determinations of the State courts (A-39-44). Citing, *inter alia*, *Allen v. McCurry*, 449 U.S. 90, 96 (1980) ("*Allen*"), it noted the important purposes of collateral estoppel to protect ". . . litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy" and, where factual determinations by a state court are at issue, of "promot[ing] the comity between state and federal courts that has been recognized as a bulwark of the federal system" (A-39-40).

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[12] Defendants also noted that, upon examination of the new McLaughlin affidavit: (1) the new number could have been, but was never offered in state court (A-20 n.6); (2) McLaughlin's exclusions continued to suffer from the same legal infirmities unanimously found by all the State courts (*see* City Supp. D.Ct. Mem., 3/6/98). In particular, he eliminated property he found undesirable, such as property in industrial areas, vacant, undeveloped property, warehouses, parking lots, waterfront property, and property with long-term leases (JA1048-59), when such property has been consistently allowed as legally suitable in *Renton*, 475 U.S. at 53-54.

After reviewing the governing First Amendment standard set forth in *Renton*, and noting the extensive submissions reviewed by the State courts, the District Court held (A-40):

> Each of the inquiries set out by the Supreme Court in *Renton* -- the legislative purpose, whether the ordinance is designed to advance a substantial government interest, and the availability of reasonable alternative avenues of communication -- is a factual issue that has been litigated by plaintiffs and decided by the Supreme Court for New York County and affirmed by both the Appellate Division and the New York Court of Appeals.

The District Court rejected plaintiffs' argument that the *England* reservation of their federal claims barred application of issue preclusion, noting that plaintiffs' chosen forum was "emphatically" the state court and that they promptly sought a remand of all claims to their chosen state forum (A-41).

In then rejecting their argument that they were denied a full and fair opportunity to litigate in State court, the Court properly applied the controlling factors under New York law (A41-44). It recognized that the fact that a case is resolved on summary judgment does not deny a party a full and fair opportunity to litigate; a party is not entitled to unlimited discovery, and state court proceedings permitting no discovery can be entitled to preclusive effect (A-42). Further, "plaintiffs viewed the New York courts as the main forum and the New York Constitution as the principal basis for their . . . effort to prevent [the] City from requiring them to close and move their businesses" and were represented by experienced and highly competent counsel (A-42). Finally, they were permitted some

discovery and had a full opportunity to press their procedural grievances, and substantive claims, in State court (A-42).[13]

THE SECOND CIRCUIT OPINION

In a comprehensive opinion, on June 3, 1998, the Second Circuit unanimously affirmed the judgment (A-3-32). It held that the District Court did not abuse its discretion in denying a preliminary injunction because, based on the State court litigation, "plaintiffs are collaterally estopped from relitigating the issues that govern their First Amendment claim," and thus could not show "a likelihood of success" or even sufficiently serious questions on the merits (A-9-10).

In so doing, the Circuit reviewed the relevant case law and the full faith and credit statute, 28 U.S.C. § 1738, wherein '"Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so"' (A-10, *Allen*, 449 U.S. at 96). It agreed with the District Court that the issues and standards applied by the New York courts in rejecting the state constitutional challenge are the same that would be applicable to their First Amendment claim (A10-11,

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[13] The District Court noted that plaintiffs were allowed to take the Mammano deposition, which, despite their complaints, provided them with "a great deal of information . . . that they used to support their position. . . . including the degree of defendant[s'] investigation of alternative sites" (A-42-43). It detailed how the New York courts addressed the discovery demands, with Justice Diamond noting: "plaintiffs' expert had had zoning maps for 10 months before he made his submission in opposition to . . . summary judgment," but had failed to estimate either the acreage or number of potential relocation sites (A-43). It also recognized that the State Court of Appeals noted the extent of the discovery provided with the record in this facial challenge totalling more than 10,000 pages (A-43).

comparing *Renton*, 475 U.S. at 49-50 with *Stringfellow's*, 91 N.Y.2d at 396-97, 399-400, 402; *see* A54-55, 62-63).

Thereafter, noting that plaintiffs had repeatedly asserted in earlier stages that the New York courts applied more favorable standards to free speech claims than federal courts, the Circuit soundly rejected as "mistaken" and "unavailing" their new arguments that federal courts required greater proof as to the substantiality of the governmental interests and the availability of reasonable alternative avenues of communication (A-11-15). As to reasonable alternative avenues, the Circuit quoted at length the New York Court of Appeals' *Stringfellow's* decision applying the *Renton* standard (A-15-16, A-62-63). Thus, *Stringfellow's* held that, *inter alia*, as set forth in *Renton*, land "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space . . ." is to be considered available, and also that land already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not automatically to be considered unavailable (A-15, A-62; *ante*, pp. 14-15).

The Circuit stressed that two federal cases that plaintiffs most heavily relied on, *Topanga*, *supra*, and *Woodall v. City of El Paso*, 49 F.3d 1120, 1124-25 (5th Cir.), *cert. denied*, 516 U.S. 988 (1995), were cited by the New York Court of Appeals (A-16-17). It rejected their further argument that there was a "serious analytic gap" between the evidence and the federal standards, expressly rejecting the far-reaching argument that federal law requires municipalities "to identify the *specific* physically and legally available relocation sites" and noting the lack of any case support for that proposition (A-17-18, italics in original). Because the Court of Appeals held that the City had to demonstrate proof of sufficient available alternative sites, the Circuit held that "to second-guess that

court's determination of this issue would violate the full faith and credit statute" (A-18).

The Circuit then reviewed the New York Court of Appeals' discussion of the City's evidence, including, *inter alia*, that 4% of unencumbered land and over 500 potential sites remain available, which encompasses a "wide mix of commercial, retail, entertainment and manufacturing uses," and the evidence of transportation accessibility (A-18). The Circuit stressed that the Court had amply considered plaintiffs' evidence, but had found it insufficient to raise material questions of fact (A-19). This was particularly because McLaughlin's analysis excluded areas that should have been included under *Renton*, such as industrial and warehouse areas and undeveloped land; even if some sites were "pragmatically" unavailable, plaintiffs did not adequately counter the evidence of enough land to cover the existent establishments where that evidence showed over 500 sites, approximately three times the existent number (A-19-20).

In sum, the Circuit held (A-21):

> "The state courts' determination that the McLaughlin Affidavit did not cast sufficient doubt on the City's evidence to preclude summary judgment --based largely on the Affidavit's failure to quantify the number of feasible sites, its reliance on premises that were invalid under *Renton*, and the persuasiveness of the City's own evidence-- does not, in short, represent a departure from federal standards. The full faith and credit statute therefore bars plaintiffs from relitigating the issue of alternative sites in federal court."

Furthermore, the Circuit held, "substantially for the reasons stated by Judge Cedarbaum," that plaintiffs did not meet their burden of proving that they were denied a full and fair opportunity to litigate their claims in State court (A-22). So too, the Circuit rejected their reliance on their *England* reservation as misplaced, given that *England* focussed on the problem of depriving a litigant who has "invoked" federal court jurisdiction from being deprived of that choice '"without his consent and through no fault of his own"'(A-23-27). It stressed that in subsequent case law, particularly *Allen*, this Court characterized *England* as applying "[w]here a plaintiff properly *invokes federal-court jurisdiction in the first instance* on a federal claim" (A-23, emphasis in original).

In contrast, here, plaintiffs did not invoke federal court jurisdiction in the first instance, but rather, following removal, vigorously fought to remand all their claims to State court and, only after the abstention order, filed an *England* reservation (A-24-25). The Circuit also agreed with those courts which have held, in light of *England*'s language and the *Allen/Migra* precedent, that *England* applies only to litigants who have sought to proceed in federal court in the first instance, and not to litigants who voluntarily chose to file in state court (A-25-26). Finally, the Circuit rejected plaintiffs' various other arguments opposing issue preclusion, and, therefore, vacated the stay and allowed "enforce[ment] forthwith" (A-27-29).[14]

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[14] On July 9 and 13, 1998, the Circuit denied the petitions for rehearing, with *en banc* suggestions; on July 22, 1998, it denied the *Amsterdam* petitioners' motion for a stay and issued the mandate (A-1-2, 1-3a). Following Justice Ginsburg's July 22, 1998 denial of their stay application, on July 28, 1998, this Court held that their further ". . . application for [a] stay addressed to Justice Souter and referred to the Court is denied." *Amsterdam Video v. City of New York*, 119 S. Ct. 4 (1998).

REASONS FOR DENYING THE WRIT

THE PETITIONS SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S DECISION IS CORRECT UNDER THE FULL FAITH AND CREDIT STATUTE. THE APPLICATION OF ISSUE PRECLUSION WAS PROPER AND THE ADULT USE ZONING ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT.

Upon review of the Second Circuit's opinion (A-3-32) and the other relevant opinions, petitioners do not raise any legal issue deserving review. Thus, the petitions should be denied.

The *Amsterdam* petitioners lead their argument with several off-base "jurisdictional" arguments. Their initial criticism is that the Circuit failed to discuss the jurisdictional consequences of the underlying abstention order under *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941) ("*Pullman*") and that there was a "blind application of the federal collateral estoppel doctrine" (*Amst.* Pet. at 15, 16-20).

These arguments are baseless. They demonstrate a fundamental misunderstanding of the full faith and credit statute and the importance of well-settled preclusion principles. As the comprehensive opinions show, upon review of the record, the Circuit carefully adhered to the governing legal preclusion principles consistently set forth by this Court. Indeed, the argument on the alleged effects of the *Pullman* order was not even presented to the Circuit or District Court.

In the instant case, the federal courts did not decline to exercise jurisdiction over the federal claims when, following the State court resolution of the state claims, petitioners returned to federal court. Rather, the federal courts exercised

their jurisdiction, but, upon review, determined that the claims could not be relitigated under the well-settled doctrine of issue preclusion or collateral estoppel.

Moreover, contrary to their suggestions, the State courts did not impermissibly exercise jurisdiction to resolve the federal claims (*Amst.* Pet. at 17), but rather exercised their indisputably valid jurisdiction to resolve the State claims. However, under the doctrine of issue preclusion, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("*Allen*").

Here, the New York State courts, including its highest Court, determined issues of fact and law necessary to resolve the free expression claim under the State Constitution, which paralleled the First Amendment claim. In so doing, the courts employed the legal standards set forth in *Renton* for determining the facial validity of an adult use zoning ordinance. On the ample record, the State courts found that defendants demonstrated that it is content-neutral, narrowly tailored to serve important governmental interests, and provides reasonable alternative means of communication.

Under the full faith and credit statute, 28 U.S.C. § 1738, which implements the full faith and credit clause, U.S. Const., Art. IV, § 1, federal courts must give the same preclusive effect to state court judgments as other courts within that state. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982). Accordingly, issues that were litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the state courts where judgment was rendered. *Allen*, 449 U.S. at 97-98;

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 82-84 (1984) ("*Migra*"). The statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. *Id.* at 84; *Baker v. General Motors Corp.*, 118 S. Ct. 657, 663-64 (1998) (reviewing history of full faith and credit clause and stressing that "regarding judgments, . . . the full faith and credit obligation is exacting . . . for claim and issue preclusion . . . purposes . . . the judgment of the rendering State gains nationwide force"); *see also Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996).

As the Circuit recognized (A-10), the statute, with the related preclusion doctrines, promotes finality of judgments and "the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 94-96; *Migra*, 465 U.S. at 84. "Such repose is justified on the sound . . . principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Federal Sv. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991).

Despite their convoluted arguments, this case does not raise broad issues of notice or prejudice as to a party's ability to litigate their federal claims in federal court following a *Pullman* order or pursuant to an *England* reservation (*Amst.* Pet. at 18-19, 21-22; *Hick.* Pet. at 26). Petitioners vigorously fought to litigate their claims in State court, and then fully litigated their claims there, represented by experienced, competent counsel, knowing that the three-prong *Islip* and *Renton* tests were substantially the same. Their pitch that this Court should clarify the meaning of "full and fair opportunity" to litigate First Amendment issues (*Amst.* Pet. at 18-19) is

misguided. Indeed, this Court has found that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer*, 456 U.S. at 483. The District and Circuit's holdings on this issue were proper under ample case law (A-22; A-41-44).

Furthermore, cases subsequent to *England* have refused to treat that case as a broad exception to the preclusion doctrines of res judicata and collateral estoppel. In *Allen*, this Court made clear that issue preclusion is generally applicable in federal actions pursuant to 42 U.S.C § 1983. *Id.*, 449 U.S. at 95-96. This Court went on to indicate that the *England* rule is designed, not to allow the relitigation of issues already decided, but to preserve federal court jurisdiction over issues of federal law. *Id.* at 101 & n.17; *see Migra*, 465 U.S. at 84-85. Tellingly, petitioners' briefs do not acknowledge these important principles. *See also Dodd v. Hood River Co.*, 136 F.3d 1219, 1227 (9th Cir.), *cert. denied*, 142 L.Ed.2d 229 (1998) (previous *England* reservation does not "does not enable [parties] to avoid preclusion of issues actually litigated in the state forum").[15]

Moreover, contrary to their assertions (*Amst.* Pet. at 21), *Instructional Sys. v. Computer Curriculum Corp.*, 35 F.3d 813 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995), supports the application of issue preclusion here. The Third Circuit

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[15] As the Circuit noted (A-23), in *Allen*, 449 U.S. at 101 n.17, this Court stated: "The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction." *See* 17A. Wright, Miller, Cooper, *Fed. Prac. & Proc.*, § 4243, at 6 (1998 Pocket Part) ("The *England* procedure strictly speaking is applicable only if a case was begun in federal court.") *and* cases cited by Circuit at A-25-26.

reviewed *England* and expressly found that "the New Jersey courts were entitled to resolve the state law issues presented in the context of the declaratory judgment suit . . . and we are bound to accept their answer . . . as well as the factual and legal findings necessary to that answer." *Id.* at 823.

Petitioners also erroneously argue about the purportedly limited scope of any eventual review by this Court (*Amst.* Pet. at 20-21). Their extreme argument on this point would bar any application of issue preclusion based on state court litigation in any context, an absurd result. Furthermore, the Circuit correctly noted that this Court would be able to review the District and Circuit Court's determinations of federal law: "namely, that the issues decided and the standards applied by the New York state courts are the same as those that would be dispositive under the First Amendment" (A-29).

Revealingly, the *Amsterdam* petitioners suggest that the use of collateral estoppel has precluded them from arguing that the standard set in *Renton* should be changed or reconsidered, especially vis-a-vis the City (*Amst.* Pet. at 23-26). That same overreaching argument could be made in any case where collateral estoppel is applied and a party is unhappy with the result in the court where the issue was fully and fairly litigated. That does not, however, preclude the application of either claim or issue preclusion, which, as discussed above, has been codified by Congress and serves important policies respecting the comity of the state and federal courts (*ante*, pp. 24-25).

The *Hickerson* petition argues that the Circuit erred or "misconstrued" the decisions in *Renton* and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opin.) ("*Young*"), and that its ruling conflicts with the Ninth and Fifth Circuits' decisions in *Topanga* and *Woodall* (*Hick.* Pet. at 18-

24). These arguments fail. As our thorough review of the relevant opinions shows, the controlling principles of *Renton* were correctly followed by the Circuit and the New York Court of Appeals, which also harmonized the *Renton* precedent with various subsequent decisions, including *Topanga* and *Woodall* (*ante*, pp. 14-15) . Clearly, petitioners do not like the principle that adult businesses, as any other, must compete in the business marketplace, but that is the law. So too, they do not like the fact that a range of land "in all stages of development from raw land to developed, industrial, warehouse office and shopping space" are permissible areas and part of the relevant marketplace, but that, too, is the law. *Renton*, 475 U.S. at 54-55.[16]

Petitioners raise a few other meritless arguments as to why issue preclusion should not have been applied. Reliance on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), as requiring an independent examination of the record in First Amendment cases (*Amst.* Pet. at 22; *Hick.* Pet. at 17, n.15), is misplaced. As the Circuit held, that case ". . . only concerns the proper level of *appellate* review, and

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[16] Notwithstanding that this Court does not to review factual issues, *post*, p. 30, petitioners argue that ". . . the relocation areas designated by the City in the state court proceedings cannot be considered reasonable by any standard" (*Amst.* Pet. at 25). That argument ignores the City's substantial evidence as to the commercial vitality and accessibility of the permissible areas and is at odds with *Renton* and its progeny (A-19). The persistent argument that there are "unique facts" because the City is "composed of five quite different boroughs" (*id.* at 23), has been consistently rejected (*see* A-18, n.5: Circuit states that the accessibility of potential sites in so-called "outer boroughs disposes of [the] argument, --which in any event, is without foundation and unsupported by case law-- that in contrast to the state courts' analysis, the First Amendment requires proof of adequate available sites on a borough-by-borough basis:" *see also* 113a).

does not bar the application of collateral estoppel" (A-27-28, italics in original). *See also Ferris v. Cuevas*, 118 F.3d 122, 125 & n.3 (2d Cir. 1997) (*Bose* standard inapplicable where the District Court's holding is procedurally-based on principles governing preclusion); *cf. Renton*, 475 U.S. at 53 n.3.

Furthermore, the alleged change in facts as to a statement made by Mayor Giuliani at a press conference following the New York Court of Appeals' decision, that the ordinance would severely limit the places adult establishments could relocate, does not meet the standard in *Montana v. United States*, 440 U.S. 147, 157 (1979) (*Hick.* Pet. at 24-25). As the Circuit recognized, *Montana* requires a significant change to the overall complexion of the record and the post-enactment press statement, "particularly when compared to the extensive legislative record compiled by the City[,]" does not meet that standard (A-28).

Finally, petitioners' presentations of the record and opinions are one-sided. At bottom, they attempt to argue factual or evidentiary issues which this Court does not sit to review. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"). Further, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

For example, despite the extensive State Court findings and their prior admissions, set forth above, the *Amsterdam* petitioners wrongly state: "No judicial findings of fact were

ever made" (*Amst.* Pet. at 9 ¶12). So too, the claimed inadequacy of the state proceedings (*Hick.* Pet. at 27-28) is belied by a review of the full record and this Court has consistently recognized the validity of the summary judgment process. *See, e.g., Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The allegations based on press accounts of the purported effects of the enforcement process (*Amst.* Pet. at 26-27; *Hick.* Pet. at 4) are outside the record and irrelevant.

As a final matter, an alternate ground supports the denial of the writ. On the merits, based on the controlling principles in *Renton* and *Young*, the denial of a preliminary injunction was proper because the adult use zoning ordinance is facially valid under the First Amendment.

Accordingly, based on all the above, the application of issue preclusion was proper under the full faith and credit statute and the adult use zoning ordinance does not violate the First Amendment.

CONCLUSION

THE PETITIONS FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1998

RACHEL HICKERSON, DEREK JONES, TY MCCONNELL, AND ELLIOT STAMLER,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT AND CENTER FOR THE COMMUNITY INTEREST, *et al.*,

Respondents-Intervenors.

(Caption Continues on Inside Cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT-INTERVENOR TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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December 2, 1998

18 pp

(Caption Continued From Front Cover)

AMSTERDAM VIDEO, INC., *et al.*,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT AND CENTER FOR THE COMMUNITY INTEREST, *et al.*,

Respondents-Intervenors.

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

This is to certify that respondent-intervenor Times Square Business Improvement District has no corporate parents or non-wholly owned subsidiaries.

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Respondent-Intervenor Times Square Business Improvement District requests that the Court deny the petition for a writ of *certiorari* seeking review of an opinion of the Court of Appeals for the Second Circuit reported at 146 F.3d 99 (2d Cir. 1998).

SUMMARY OF THE ARGUMENT

No matter how petitioners clamor for a second bite at the apple, the fact is that the Second Circuit correctly resolved petitioners' First Amendment claim under the doctrine of collateral estoppel. Because the federal and state standards at issue are exactly the same, the unanimous decisions of the state courts to uphold the City's zoning ordinance were based on an inquiry into the *identical factual issues* pertinent to the federal Constitutionality of the Resolution: *i.e.*, the City's intent in enacting its zoning ordinance and the sufficiency of available locations for relocation. The failure of petitioners to produce evidence on these factual issues in state court doomed their First Amendment claim.

Petitioners, who avidly sought to litigate in state court, are not entitled to waste judicial resources and conduct repetitive litigation by abusing the reservation procedure set forth in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). An *England* reservation is intended to benefit parties *forced* into state court, not those who vigorously sought to have the state courts litigate all their claims. Moreover, *England* applies to *claim* preclusion, and does not bar the effect of collateral estoppel with respect to factual issues decided in the state court. Thus, *England* has no bearing on petitioners' ability to re-litigate issues already resolved in the earlier proceedings.

Finally, the Constitutionality of New York's zoning Resolution is unambiguous. Sixteen judges, sitting in five different courts, have agreed that the Resolution is aimed at negative secondary effects rather than content, and that it provides petitioners with alternative avenues of communication

that amply satisfy the requirements of the First Amendment. Because the zoning ordinance falls safely within the Constitutional parameters explicated by this Court, this Court need not expend its limited resources to examine what was, in essence, a straightforward application of this Court's First Amendment doctrine as set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

REASONS FOR DENYING THE WRIT

THE SECOND CIRCUIT PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL.

A. A purported *England* reservation does not preclude the application of collateral estoppel on these facts.

Petitioners seek to frustrate the application of collateral estoppel by means of their purported *England* reservation. However, as this Court made clear in *England*, an *England* reservation is intended to protect parties *forced* to litigate in state court. *See England*, 275 U.S. at 415 ("[T]here are fundamental objections to any conclusion that a litigant *who has properly invoked the jurisdiction of a Federal District Court* to consider federal constitutional claims can be compelled, *without his consent and through no fault of his own*, to accept instead a state court's determination of those claims.") (emphasis added). Here, by contrast, petitioners unreservedly submitted both state and federal claims to the courts of New York State in the first instance, and vigorously fought to keep all their claims in that forum. *Cf. Migra v. Warren City Sch. District Bd.*, 465 U.S. 75, 85 n. 7 (1984); *Allen v. McCurry*, 449 U.S. 90, 101 n. 17 (1980) (*England* applies where a party "invokes federal-court jurisdiction *in the first instance* on a federal claim") (emphasis added); *England*, 375 U.S. at 421 (stressing that, in abstention context, a party's *choice* of federal forum must be protected).

That a reservation of federal claims pursuant to *England* exists only for the benefit of parties forced to litigate claims in state court against their will is the unanimous view of the Courts of Appeals.[1] *See, e.g., Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1304-6 (11th Cir. 1992); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1071 (3d Cir. 1990); *Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir. 1988); *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 311-12 (1st Cir. 1986); *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979) ("Appellants from the early days of their dispute with the City have sought to have their federal claims heard in a federal court.").

Here, by contrast, it was clear from the beginning that petitioners hoped that the state constitution would prove more helpful to them than the First Amendment as applied by this Court:

> That is why petitioners filed 13 state law claims in state court, with a sole federal claim that they themselves described as an "adjunct" to their state causes of action. *See, e.g.*, Brief of Amsterdam Video in Support of Motion to Remand at 28 ("[I]n our case, not only is the federal claim an adjunct to the state claims, but it is factual (*sic*) intertwined with the state charges"); Beth Haroules (for the Hickerson petitioners), Transcript of Oral Argument on Motion to Remand, at 7 ("Your honor, the federal claim is asserted as an adjunct to the state constitution.").

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[1] Certain of the federal courts of appeals consider the fact that a party filed first in state court to be dispositive, *see, e.g., Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir. 1988), while others evaluate the totality of the evidence that a party was "forced" to litigate in the state court and the extent to which the litigant submitted to state court jurisdiction. *See, e.g., United Parcel Svc. v. California Public Utils.*, 77 F.3d 1178, 1186 (9th Cir. 1996). Not one appellate court, however, has intimated — nor could any, in light of *England*'s emphasis on protecting a party's *choice* of forum — that a party may proceed to federal court *regardless* of its intent to litigate the same claims in an earlier state proceeding.

That is why petitioners fought so vigorously to remain in state court when confronted with respondents' notice of removal to federal court.

That is why, in stark contrast to the position they take before this Court, petitioners assured the federal district court that: "No credible claim can be made that a federal court is in a better position than the New York State court to inquire into the adequacy and suitability of [the alternative] sites." Brief of Amsterdam Video in Support of Motion to Remand at 20.

That is why petitioners filed the affidavit of their expert, Robert McLaughlin, knowing full well that (as the state court found) it incorporated "the same methodology" that this Court had "specifically rejected" in *Renton. Stringfellow's v. City of New York*, 653 N.Y.S. 2d 803, 810 (N.Y. Sup. Ct. 1996) (*"Stringfellow's I"*).

Thus, petitioners can in no sense be said to have been *forced* to litigate in state court. To the contrary, petitioners filed all their claims in state court. Removal was effected only over their vehement protest and followed by a motion to remand in which petitioners proclaimed the adequacy of the state court to determine all their claims. *See Hickerson v. City of New York*, 932 F. Supp. 550, 556 (S.D.N.Y. 1996) ("*Hickerson I*") ("[P]laintiffs' state claims are remanded . . . Plaintiffs, however, want more. They seek to have their federal constitutional claims decided by a state court.").

Moreover, even if it were applicable here, *England* only operates to preserve *claims* a party wishes to bring to the attention of the federal court, rather than *issues* that were necessarily resolved by the State court. *England* does not abrogate the requirement that federal courts rely on the resolution of issues resolved in an earlier proceeding. *See, e.g., Wicker v. Bd. of Educ. of Knott County*, 826 F.2d 442, 448-49 (6th Cir.1987) ("Even though [plaintiff] reserved his federal claims in state court, there still can be issue preclusive effect

accorded to both state court findings of law and findings of fact."); *Bradley*, 913 F.2d 1064 at 1073 ("As the Court recognized in *England*, even a litigant who has made a valid reservation may not relitigate an issue he/she unreservedly litigated in state court."). *See also* Restatement (Second) of Judgments § 86, cmt. f, illus. 7 (1982) (stating that factual issue litigated in state court may not be relitigated, although federal claims may have been reserved). Thus, even if petitioners had not vehemently insisted on litigating in state court — as they did — *England* would have no bearing on the final resolution of factual issues relevant to petitioners' federal claim.

B. Because the federal and state standards are the same, the Second Circuit properly applied collateral estoppel with regard to issues decided by the state court.

Given that *England* has no place here, the Second Circuit was correct to make its straightforward decision that petitioners' inability to withstand summary judgment in the state courts signaled a similarly fatal dearth of evidence with respect to petitioners' federal claim. Collateral estoppel is routinely applied by the federal courts where, as here, a prior decision was based on the same standards applicable to a later proceeding. *See Allen*, 449 U.S. at 94 (stating that federal courts traditionally have followed rules of issue preclusion and *res judicata*). As the Second Circuit rightly concluded, the courts of New York state have incorporated the federal free speech standard into state law. *See, e.g., Stringfellow's v. City of New York*, 694 N.E.2d 407, 415 (N.Y. Ct. App. 1998) (*"Stringfellow's II"*) (reviewing *Renton* and other federal precedents and extensively citing federal cases as well as parallel state opinions in support of ruling under state law).

Comparing the law of the two jurisdictions indeed reveals that the standards are identical. The New York state and federal free speech standards both subject a zoning regulation to the *same* two inquiries. First, the ordinance must be justified

by a purpose unrelated to content; specifically, the desire to combat negative secondary effects associated with adult establishments. *See, e.g., Renton*, 475 U.S. at 48 (stating that relevant question is whether the "predominant intent" of zoning law is "unrelated to the suppression of free expression"); *Stringfellow's II*, 694 N.E.2d at 415 (inquiry is whether ordinance is "purposefully directed at controlling the content of the message conveyed through adult businesses" rather than "aimed at an entirely separate societal goal"). Second, adult uses must be left with a reasonable opportunity to exist in the marketplace. *See, e.g., Renton*, 475 U.S. at 50 (ordinance must allow for "reasonable alternative avenues of communication"); *Stringfellow's II*, 694 N.E.2d at 418 (explaining that, under state law, ordinance must be "no broader than necessary" in that it "assure[s] reasonable avenues of communication," and that "ample space" must remain for adult uses).[2]

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[2] In a dramatic reversal of their position throughout the state court litigation, petitioners argue that the federal courts "require a more rigorous examination of alternative locations" than that deemed sufficient by the state courts. *See, e.g.*, Petition of the Hickerson Plaintiffs for Writ of *Certiorari* at 14. In fact, no federal court has required a showing of specific sites for relocation, as petitioners contend. Indeed, it would be impracticable to require cities to designate specific sites for relocation: since most zoning ordinances impose a distance requirement between adult businesses, where one adult business may locate depends in part on where another adult business has located.

Despite petitioners' criticism of New York City's evidence as overly "abstract," the City's designation of land in fact is indistinguishable from the assessment conducted by many of the federal courts cited favorably by petitioners. *See, e.g., Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995) ("[T]he collection of specific sites suggested by the City was but one possible arrangement of adult business locations that could coexist under the . . . Ordinance. . . . [V]irtually every site could be shifted to some nearby location without significantly upsetting other sites or reducing the total number of sites available."); *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255, 1260 (5th Cir. 1992) ("Nothing in the instant record permits us to say that all or even most of the locations are inaccessible, unsafe, or without utilities or infrastructure. . . . Thus, although the record does not

In the state court proceedings, petitioners failed entirely to raise any genuine, material issue of fact regarding the ability of New York's zoning Resolution to satisfy the two-prong standard set forth above. Put simply, petitioners cast doubt on neither the City's purpose nor the availability of alternate locations. As the district court noted, the virtually unrebutted evidence produced by New York City supported the following conclusions: (1) the City acted in response to concerns regarding the secondary effects of adult establishments; (2) the City reasonably relied on a number of studies to conclude that adult businesses produce adverse secondary effects; (3) the Resolution is no broader than necessary to prevent those adverse effects; and (4) the City "more than sufficiently demonstrated" that the permissible areas for adult establishments remaining in the City are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate. *See Hickerson I,* 997 F. Supp. 418 at 423 (citing *Stringfellow's I,* 653 N.Y.S.2d at 803, 808, 809, 814).

In light of petitioners' inability to create doubt as to either of the two relevant prongs, the doctrine of collateral estoppel — as well as ineluctable logic — required the Second Circuit to reject the efforts of petitioners to relitigate the precise same issues that had been decided in the state courts.

Petitioners attempt to characterize the application of collateral estoppel in this case as an abdication of duty by the federal courts. The truth is just the opposite. This Court has clearly stated that federal courts *must* give estoppel effect to issues and claims resolved in the state courts. *See Migra*, 465

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permit us to say with precision how many additional sites exist, a substantial number do."); *Walnut Properties v. City of Whittier*, 861 F.2d 1102, 1107 (9th Cir. 1988) ([T]he district court made no findings with respect to the actual number of potential sites available . . . . However, that deficiency does not hinder us because we can roughly estimate the number of available sites . . . .").

U.S. at 84; *Allen*, 449 U.S. at 95-96. Not only does the doctrine of collateral estoppel conserve judicial resources, "but [it] also . . . promotes the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96. The decision of the Second Circuit to hold petitioners to issues as litigated in the state courts served the interests of federalism as well as judicial economy and common sense.

THIS COURT SHOULD NOT OVERTURN, NOR NEED IT REVISIT, RENTON.

Since *Renton* was decided only a little over than a decade ago, the lower courts have relied on its clear precepts to evaluate the constitutionality of dozens of municipal ordinances. The instant case is well within the mainstream of these cases, and there is no reason to revisit *Renton,* let alone overturn it.[3] Under *Renton*, as well as the identical state standard, the zoning ordinance at issue unquestionably is Constitutional.

Unlike ordinances that test the limits of Constitutional regulation, New York City's Resolution is well within the standards set by this Court; indeed, it leaves space to

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[3] Petitioners urge this Court to intervene by claiming a "conflict" between the Second Circuit and two opinions of the Fifth and Ninth Circuit courts of appeals. *See, e.g.,* Petition of the Hickerson Plaintiffs for Writ of *Certiorari* at 14 (citing *Topanga Press v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); *Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995)). Such a conflict is belied, most obviously, by the fact that every court that has ruled on the Resolution thus far — including the Second Circuit — has cited these two cases in its discussion of the First Amendment without perceiving any conflict with other circuits or shortcoming on the part of the ordinance. Moreover, to the extent that these cases do purport to exclude land that is physically or practically unavailable — *e.g.,* underwater or allocated for airport use — New York City's 4 % figure represents land available *after* the exclusion of properties unlikely ever to become available for commercial use from its initial figure of 11%. *See Stringfellow's II*, 694 N.E. 2d at 419.

accommodate far more than the number of establishments that may seek to relocate. As the Second Circuit noted, New York City offered evidence that, *"after excluding land identified by the City as being unlikely to be developed for commercial use,* 4 % of the total land area of the City remained open to adult establishments . . . [A]fter factoring in the Zoning Amendment's 500-foot buffer zones, over 500 potential sites remained available." *See Hickerson v. City of New York*, 146 F.3d 99, 1078 (2d Cir. 1998) (*"Hickerson II"*) (emphasis added) (citing *Stringfellow's II*, 694 N.E.2d 407 at 418). The Second Circuit recognized that the ordinance leaves no shortage of alternative avenues of communication, given that "this land could accommodate . . . approximately *three times* the number of establishments that currently exist." *Id.* at 109. In agreement with the district court and each of the state courts, the Second Circuit accepted the City's evidence that all the areas in Manhattan zoned for adult use and 80% of the land in other boroughs are within a 10-minute walk from a subway line or major bus route.

In lieu of presenting this Court with reasons to overturn a carefully considered ruling of recent vintage, petitioners here simply have tried to relitigate matters flatly disposed of by *Renton*. The essence of their petition to this Court is not, as they claim, that any conflict or departure from judicial norms necessitates resolution by this Court. Rather, it is that petitioners seek to overturn *Renton* itself.[4]

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[4] Ironically, in light of their attack on *Renton*, petitioners argue that they have been estopped from urging the reconsideration of federal free speech standards. In fact, petitioners lobbied for a modification of the First Amendment standards set forth by this Court before both the district court and the Second Circuit, pressing the novel argument that *Renton* requires cities to identify specific sites, and asking the Second Circuit to conduct an unprecedented borough-by-borough analysis of the ordinance. The current posture of this case itself is the clearest evidence that, far from being forced to subsist under an unreviewable decision of the state court, petitioners remain free to urge their interpretations of *Renton* and its progeny upon this Court, as they unsuccessfully did in three state courts, the district court and

That petitioners seek to overturn *Renton* is evident in that their interpretation of governing law is the same as that of the Ninth Circuit in *Renton* itself. But this Court *reversed* the decision of the Ninth Circuit, which had struck down the city of Renton's ordinance in part because the 520 acres of available land included a sewage plant, a horse racing track, a business park containing only buildings suitable for industrial use, a warehouse, an oil tank farm, and a fully-developed shopping center.[5] In *reversing* that decision, this Court commented that the land available included "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space . . . ." Here, in direct contravention of *Renton*'s teaching, and instead in accordance with the methodology rejected in *Renton*, petitioners' expert excluded land that is industrially zoned, zoned for warehouses, currently used as a parking or storage lot, subject to a long-term lease, currently housing hazardous waste, or requires a permit to change its zoning classification.

Ignoring for the moment the fact that petitioners' strategy is in derogation of the rulings of countless lower courts, it also is in blatant disregard of *Renton*'s clear mandate that the fact that adult establishments "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Renton*, 475 U.S. at 54. At bottom, all of petitioners' mischaracterizations of governing law and attempts to exclude viable relocation sites on the basis of factors deemed impermissible by this Court amount to one thing: an end run around *Renton*. That is why they have attempted to force a strained, impracticable standard for assessing alternative

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the Second Circuit.

[5] *Cf.* Petition of the Hickerson Plaintiffs For Writ of *Certiorari* at 8 (criticizing relocation sites offered by the City including "Manhattan's Flower District . . . the Rockefeller Center Complex . . . Bronx Terminal Market, Hunts Point Sewage Treatment Plant," *etc.*).

locations on every court that has rejected their claims. That is why they fought so hard to litigate in state court in hopes that they might evade *Renton* altogether.

Petitioners do not seek the protection afforded by the First Amendment. Rather, they seek protection that exceeds the protection afforded to all other businesses subject to zoning: to wit, specific retail locations guaranteed to be immediately available, desirable, and economically viable. This Court should not indulge that demand at the expense of its own precedent, the law of the circuits, and the "high respect" to which a city's attempt to preserve the quality of urban life is due. *Renton*, 475 U.S. at 50 (citing *Young v. American Mini-Theatres*, 427 U.S. 50, 71 (1976)).

CONCLUSION

For the reasons stated above, the petitions for a writ of *certiorari* to review the decision of the Second Circuit should be denied.

December 2, 1998

Respectfully submitted,

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No. 98-569

In The

Supreme Court of the United States

October Term, 1998

AMSTERDAM VIDEO INC., *et al.*,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF TRI-CITE MANAGEMENT, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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101pp

QUESTIONS PRESENTED

1. In New York City adult zoning is the United States Court of Appeals for the Second Circuit entitled to rely on 28 U.S.C. § 1738 to find collateral estoppel based on full and fair opportunity to be heard, place the burden on petitioners, and thus affirm the grant of summary judgment to respondents, and totally ignore New York Law which clearly places the burden on the respondents to show that unavailability of land was decided and decisive, particularly where in the federal court, petitioners did show such unavailability?

2. In a First Amendment case, is the New York State Court of Appeals' finding of no want of due process because of petitioners' failure to seek a hardship amortization extension when the enforcement was stayed and, as a corollary under ZR § 72-40, is it permissible in a First Amendment case to limit recoupment for amortization only to expenditures necessary for the adult use, such as adult videotapes, and ignore the remaining expenditures, such as walls, cement, plaster, boiler, air-conditioner, made in good faith at a time when an adult use is permissible?

LIST OF PARTIES AND RULE 29.6.

Neither the present amicus Tri-Cite Management, Inc. nor, to the best of our knowledge, any of the Amsterdam Video petitioners have any parents or subsidiaries. All parties are listed in Appendix A, the Second Circuit Opinion (1a-4a).

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BRIEF OF AMICUS CURIAE[1]

The brief of amicus Tri-Cite Management, Inc. (Tri-Cite) is submitted in support of petition of Amsterdam Video, Inc. (Amsterdam) to review the Opinion of the United States Court of Appeals for the Second Circuit entered June 3, 1998 in the Office of the Clerk of the Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (hereafter Second Circuit Opinion) is reported sub nom. *Hickerson v. City of New York*, at 146 F.3d 99 (CA 2, 1998) (1a-32a). It affirmed the judgment and order of the United States District Court, Southern District of New York, sub nom. *Hickerson v. City of New York*, 997 F.Supp. 418 (S.D.N.Y, 1998) (33a-47a). Both opinions held that the New York State Court of Appeals properly granted summary judgment to respondents under collateral estoppel full and fair opportunity to litigate the issues (7a, 20a n.6, 23a, 32a, 46a).

The New York State Court of Appeals' opinion grant of summary judgment for respondents is reported sub

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[1] All parties have consented to the filing of this amicus brief. No counsel for any party has authored this brief in whole or in part. Except for the caption and this footnote 1 and other very minor changes, this brief is identical to the October 9, 1998 timely served and filed petition under the abbreviated name of *Serendib, etc. v. The City of New York, et al.* Mr. Lorson returned all forty copies and the motion to file the Serendib petition on the theory one cannot have "two bites of the apple". Serendib has not had even one bite of the apple.

The entity who made a monetary contribution is Tri-Cite. This Brief raises issues *not* raised by the *Amsterdam* petitioners.

nom. *Stringfellow's of New York, Ltd. v. City of New York, et al.* at 91 N.Y.2d 382, 671 N.Y.S.2d 406 (1998) and reproduced at 48a-75a.

JURISDICTION

The opinion of the Second Circuit was entered June 3, 1998. A timely petition for rehearing by the Amsterdam petitioners was denied July 13, 1998. (76a) The jurisdiction of this Court to review the opinion of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are:

> AMENDMENT I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> AMENDMENT XIV, Section 1, Due Process and Equal Protection. Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738 provides in pertinent part:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

On October 25, 1995, the New York City Council gave final approval to N 950384 ZRY Amendment to the Zoning Resolution applicable to adult establishments. In February, 1996, the Amsterdam petitioners commenced an action in the New York State Supreme Court, alleging both a violation of the New York State Constitution Article I § 8, and the First Amendment to the United States Constitution. (55a-56a)

Respondents removed the case to the United States District Court for the Southern District of New York (hereafter District Court). On the Amsterdam petitioners' application, the District Court remanded to the State Court the " * * * plaintiffs causes of action under the [New York] State Constitution, * * * " retained jurisdiction over the federal claims. *Hickerson v. City of New York,* 932 F.Supp. 550 (S.D.N.Y. 1996). (56a, quote is from the Second Circuit) (and see 932 F.Supp. at 556; state constitution " * * * differs from the provisions of the federal constitution on which [the Amsterdam petitioners] rely".)

Thereafter, the Amsterdam petitioners advised the State Court of their intention under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) to litigate the federal court claims in the federal court. However, the New York State Court of Appeals held there was no difference between the United States Constitution First Amendment test under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and the New York Constitution Article I, Section 8 test, under *Town of Islip v. Caviglia*, 73 N.Y.2d 544 (1989). (68a-70a)

Turning to the specifics of alternative avenues of communication, in *Stringfellow* the New York State Court of Appeals held the Amsterdam petitioners' expert's affidavit of Robert McLaughlin was insufficient as a matter of law to withstand the grant of summary judgment to respondents because:

> "The most significant flaw in McLaughlin's affidavit, however, is the absence of any attempt to *quantify his observations* or to make concrete allegations as to precisely how many of the *500* potential receptor sites identified by defendants were, in his estimate, unavailable." (72a, emphasis supplied)

The New York State Court of Appeals then held:

> "Even if the criticized sites are eliminated, the absence of any *quantification* in the McLaughlin affidavit makes it impossible to determine whether what remains of the *500 identified* sites is insufficient to accommodate the 177 adult businesses that will have to relocate once the amendments are implemented. For example, despite McLaughlin's observations that several tracts within the nonresidential

> zone along the far west side of Manhattan are physically or pragmatically unavailable, *his affidavit* does not contain the *hard factual data* necessary to establish that, with the elimination of these sites and with due consideration of the dispersal requirement, the City's claim that Manhattan will accommodate some 75 adult uses *represents a significant overestimation*. Given this shortfall, the accuracy of the City's own over-all calculations was not called into serious question." (72a, 73a, emphasis supplied)

Therefore, on the separate issue of alternative avenues of communication, in *Stringfellow* the New York State Court of Appeals granted summary judgment to respondents. (73a, 671 N.Y.S.2d at 419) Finally, the New York State Court of Appeals held that the one-year amortization in this First Amendment case was not too short because the Amsterdam petitioners did not apply to the Board of Standards and Appeals and, therefore, there was no due process violation. We digress to note that the enforcement had been stayed. (58a n.1)

The Circuit Court affirmed on the basis that collateral estoppel full and fair opportunity to litigate had been granted by the New York State Courts, and there were no differences between the New York State and Federal constitutions regarding adequate avenues of communication for adult uses. (7a, 9a, 14a-20a and n.6, 23a-24a, 32a) The Second Circuit first held:

> "We agree with the district court that the 'full faith and credit' statute prevents a federal court from revisiting the same issues that were decided against plaintiffs by the New York state courts, which provided plaintiffs with a full and

fair opportunity to litigate these issues. Accordingly, we affirm." (7a)

The Second Circuit in amplification extensively quoted the New York State Court opinion and specifically opined that the Amsterdam petitioners had a full and fair opportunity to litigate because Mr. McLaughlin's affidavit, " * * * considered land to be 'unavailable' ", which *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 53-54, held was sufficient. (15a, 16a, 19a, 20a n.6, 23a)

In footnote 6, the Circuit Court plainly held that a "belated submission" by Mr. McLaughlin cannot overcome the Court's determination of collateral estoppel based on a full and fair opportunity to be heard. See also Circuit Court heading, *"Plaintiffs' Opportunity to Litigate the Issues in State Court,"* (23a). Neither the District Court nor the Circuit Court cited *D'Arata v. New York Central Mutual Fire Ins. Co.*, 76 N.Y.2d 659, 664, 563 N.Y.S.2d 24, 26, 564 N.E.2d 634 (1990); *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 456, 492 N.Y.S.2d 584, 588, 482 N.E.2d 63 (1985) was quoted by the Second Circuit under the heading, *"Plaintiff's Opportunity to Litigate the Issues in State Court,"* to wit, that the Amsterdam petitioners " * * * as the parties opposing the application of collateral estoppel, bear the burden of proving that they were denied this full and fair opportunity". (23a)

REASONS FOR GRANTING THE WRIT

1. There is a direct conflict between the Second Circuit opinions' reliance on 28 U.S.C. § 1738, *Allen v. McCurry*, 449 U.S. 90, 96 (1980), *Migra v. Warren City*

School District Board of Education, 465 U.S. 75, 81 (1984) and the Second Circuit's holding of full and fair opportunity to be heard and the controlling opinion of the New York Court of Appeals, *D'Arata v. New York Central Mutual Fire Ins. Co.*, 76 N.Y.2d at 664, and *Haring v. Prosise*, 462 U.S. 306 (1983).

Under *D'Arata*, a New York State Court judgment is preclusive by way of collateral estoppel (1) where respondents bear the burden of proving the "identical issue" was necessarily decided and decisive, and (2) where petitioners bear the burden of proving they did not have a full and fair opportunity to litigate.

Haring unanimously held a guilty plea to the manufacture of a controlled substance did not bar by collateral estoppel a 42 U.S.C. § 1983 damage action for an alleged Fourth Amendment violation which was not " * * * actually litigated and determined" (id. at 315).

The Second Circuit held that:

> "Under the full faith and credit statute, 28 U.S.C. § 1738, 'Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.' *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *See also Migra v. Warren City Sch. Dist.Bd. of Educ.*, 465 U.S. 75, 84 (1984)". (8a)

However, one look at the Second Circuit Opinion makes it very obvious that the Court did not cite or consider (a) *D'Arata* or (b) its holding that the burden is on the *respondents* to show that the matter was actually litigated and decisive. All the Second Circuit held was

that Federal Law did not require the McLaughlin affidavit to "identify specific [relocation] sites". The Second Circuit otherwise ruled that the Amsterdam petitioners, based on a full and fair opportunity to be heard, were collaterally estopped from any trial showing that respondents had "significantly" overestimated the alternative avenues of communication. (20a and n.6, 21a)

Nonetheless, the Amsterdam petitioners by Mr. McLaughlin did *quantify* in the Federal Court. Assuming the figures set forth in the Second Circuit Opinion, footnote 6, are correct, the Amsterdam petition on the Second Circuit's own figures did show in the Federal Court, by concrete fact, that the respondents had made a "significant overestimation" of land space availability by approximately 82%. We have used space availability of 90. (90 out of 500, 90/500 = 18%) (20a and n.6)

Translated into a percentage of the total City acreage, instead of spaces available, it is approximately one 100th of 1% of the total New York City acreage, computed as follows: The 1996/1997 Green Book entitled, "The Official Directory of the City of New York", page 594, sets forth the total acreage in New York City as 205,952 acres. Assuming one (1) space equals one acre, or 43,560 square feet and bearing in mind that the adult Zoning Ordinance does not permit more than 10,000 square feet per adult establishment, or approximately one-fourth of an acre (43,560 square feet per acre), we have the following calculation. Ninety (90) acres divided by 205,952 acres equals .000438 and one-fourth of the .000438 is approximately one 100th of one percent.

This Court can take judicial notice of the Green Book and the adult Zoning Ordinance. Federal Rules of Evidence Rule 201(b)(f). 21 Wright and Graham, *Federal Practice and Procedure: Evidence*, § 5110, p. 521 et seq.

D'Arata first held:

> "As this doctrine has evolved, only two requirements must be satisfied. First, the party seeking the benefit of collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action (See, *Kaufman v. Eli Lilly & Co.*, supra, at 455, 492 N.Y.S.2d 584, 482 N.E.2d 63). Second, the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination. The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate (*see, id.*, at 455-456, 492 N.Y.S.2d 584, 482 N.E.2d 63). Collateral estoppel, we have held, is grounded on concepts of fairness and should not be rigidly or mechanically applied." (76 N.Y.2d at 664)

The New York Court of Appeals further defined "necessarily decided" and actually determined as follows:

> "Generally, for 'a question to have been actually litigated' so as to satisfy the identity requirement, it 'must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding.' " (76 N.Y.2d at 667)

In *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d at 456, the New York State Court of Appeals, speaking of collateral

estoppel principle if necessarily decided as applied to concerted action, held:

> "Although both of these issues could have been raised by appropriate objection in the trial court, they were not, and *because they were not, we did not pass on them.*" (65 N.Y.2d at 456, emphasis supplied)

See also *Halyalkar v. Board of Regents of the State of New York*, 72 N.Y.2d 261, 267-269, 532 N.Y.S.2d 85, 88, 89, 527 N.E.2d 1222 (1988) guilty plea to charge wilfully and knowingly, no collateral estoppel because no identicality; wilful not actually litigated; Restatement * * * Of Judgments 2d § 28(4) collateral estoppel not applicable where different burden of proof.

In *Stringfellow*, the New York State Court of Appeals held that the McLaughlin affidavit's failure to quantify (this is the word of the New York Court of Appeals) did not raise an issue of fact sufficient to oppose the grant of summary judgment. It is impossible to conclude that the New York State Courts "necessarily decided" that any and all quantification by Mr. McLaughlin would fail to preclude summary judgment, or that when Mr. McLaughlin did quantify 90[2] available spaces instead of

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[2] In this petition, we assume the 90 space availability used by the Second Circuit, in its footnote 6, is correct. Even using 90, there is a significant over-estimation by respondents of 82% of land space available. Translated into percentages of land availability, and assuming the Second Circuit is correct, ninety spaces are, as stated, approximately one 100th of 1% of total land availability.

500, or approximately 82% unavailable spaces, the City gave a "significant overestimate on" available spaces precluding *all* opportunity to show otherwise.

The Second Circuit made it very plain that the failure to quantify (which McLaughlin subsequently did) was in the Federal Court insufficient because it was "belated" based on the Second Circuit " * * * agreement with the district court that the plaintiffs had a full and fair opportunity to present evidence * * * ". (20a n.6) In other words, the Second Circuit held there was issue preclusion based on the *burden* being on the Amsterdam *petitioners* to show lack of a full and fair opportunity to present quantification, instead of following New York law. One cannot under 28 U.S.C. § 1738 and *Migra*, 468 U.S. at 84, 85, totally ignore one-half of New York Law of collateral estoppel as the Second Circuit n.6 attempted to do.

The requirement that there be a Federal Court determination of whether there have been sufficient avenues of communication left open is further buttressed by a consideration of the following cases.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.35 (1976), the Court upheld the Zoning Ordinance only because there was no elimination of adult uses. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 44, there was " * * * no [adult] use existing in the city at that time". In the present case, it is uncontested that there will be an elimination of 84% of the New York City's presently existing 177 adult uses. (70a)

In addition, there is vast confusion in the federal courts as to who has the burden of persuasion as to the availability of alternative avenues of communication.

North Avenue Novelties, Inc. v. City of Chicago, 88 F.3d 441 (CA 7, 1996) " * * * burden is on the government to justify the regulation", id. at 444. Does this mean only that the City must justify the substantiality of the governmental interest, i. e., blight, or does it refer to alternative avenues of communication? *Christy v. City of Ann Arbor*, 824 F.2d 489, 491 (CA 6, 1987) (burden on government to show purpose of eradicating urban blight); *Woodall v. City of El Paso*, 49 F.3d 1120, 1121 (CA 5, 1995) (burden apparently on plaintiffs); *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (CA 9, 1993); *Phillips v. Borough of Keyport*, 107 F.3d 164, 175-178 (CA 3 en banc 1997).

Further, there is a well-settled rule that despite F.R.Civ.P. 52(a), where the First Amendment is at stake, the clearly erroneous rule does not apply and the Court is required to conduct its own investigation into the record. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 493, 503, 510 (1984); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S.___, 132 L.Ed.2d 487, 499, 500 (1995).

Lastly, as this Court stated in *Haring v. Prosise*, supra, even if the matter is precluded under State law, nonetheless, redetermination may be " * * * warranted if there is reason to doubt the quality, extensiveness or fairness of the procedures followed in the prior litigation". (462 U.S. at 317, 318) Just how a procedure can be deemed fair which relies on New York collateral estoppel law, but ignores one-half of that New York law and precludes virtually all adult entertainment establishments exercising First Amendment rights, with no opportunity to show that the facts accepted by the New York Court of Appeals

on summary judgment are not true, escapes us. See also Restatement * * * of Judgments 2d § 28(4) and (5).

2. In this First Amendment case, *Stringfellow* held there was no due process violation because petitioners had failed to seek a hardship amortization extension. (73a-74a) Apparently, the New York Court of Appeals forgot that all enforcement of the Amended Zoning Resolution was stayed. (6a n.2, 58a n.1) The stay seems to include the obvious stay of any requirement that there be an application for amortization.

Further, that the requirement that there be an application to the Board of Standards and Appeals under ZR 72-40 itself is violative of the First Amendment. For ZR 72-40 limits the "financial expenditures" to capital outlay, for "adult establishments". (78a-79a) *Acc'd Steam Heat, Inc. v. Silva*, 230 A.D.2d 800, 646 N.Y.S.2d 537, 540 (2d Dept. 1996) (" * * * only * * * expenditures directly related to the adult entertainment use * * * ").

In other words, all of the financial expenditures to install walls, cement, plaster, air conditioners, boiler, lighting made in good faith to establish an adult use, at a time when an adult use was permitted, are not directly related to adult use and, therefore, cannot be recouped. This is no amortization at all. It flies in the face of *Young v. American Mini Theatres, Inc.*, 427 U.S. at 71 n.35, and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 44, *754 Orange Ave., Inc. v. City of West Haven, Connecticut, et al.*, 761 F.2d 105, 113 (CA 2, 1985), quoting *Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207, 1224 (N.D.Ga. 1981), which held that "[m]ost adult zoning ordinances passed in the

wake of *Young v. American Mini Theatres, Inc.*, have contained grandfather clauses permitting pre-existing, nonconforming uses as to all regulated adult businesses." (761 F.2d at 113)

Stringfellow held there was no difference between the principles of the First Amendment as interpreted in *Renton* and those of Article I, § 8 of the New York Constitution as interpreted in *Town of Islip* and, in both, there must not be " * * * a substantial reduction in the total number of adult outlets * * * ". (68a-70a, quote is from 70a) With reference to amortization, it is very very clear that the New York State Court of Appeals did not in any way consider the controlling First Amendment federal court decisions. Under *D'Arata v. New York Central Mutual Fire Insurance Co.*, 76 N.Y.2d at 664, the issue of amortization under the First Amendment was very clearly *not* decided and *not* determinative.

CONCLUSION

The writ should be granted and the judgment of the United States Court of Appeals for the Second Circuit reversed, and the matter remanded with directions to reconsider in accord with the Opinion.

Dated: New York, New York

December 1, 1998

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: April 29, 1998) Decided: JUN 3 1998

Docket Nos. 98-7269, -7270

(Filed June 3, 1998)

RACHEL HICKERSON, DEREK JONES, TY MCCONNELL, and ELLIOT STAMLER

Plaintiffs-Appellants,

AMSTERDAM VIDEO INC., A & X ENTERTAINMENT INC., d/b/a Playpen II, ADULT VIDEO, INC., ASCOT SPACE AMUSEMENT, INC., d/b/a Ascot Theatre, BIG APPLE CINEMAS INC., d/b/a Show Follies Theater, BRETT DISTRIBUTORS, INC., d/b/a Media Distributors, CAPRI CINEMA INC., CAPWELL ENTERTAINMENT, INC., d/b/a Legz Diamond's Playhouse, CHURCH STREET CAFE INC., d/b/a Baby Doll Lounge, COLLEGE PT. REST. CORP., d/b/a Gallagher's II, CRAZY FANTASY VIDEO, INC., CUPID'S TREASURERS, INC., d/b/a Banana Video and Unicorn, DARA DISTRIBUTORS INC., d/b/a Love Shack, DESIRE VIDEO INC., E & A BOOKS, INC., E & A VIDEO AND MAGAZINE INC., ED-MART BAR & GRILL INC., d/b/a Penny Whistle, FOR THE PEOPLE THEATRES OF N.Y., INC., d/b/a Fair Theatre, FOUR KEYS ENTERPRISES, INC., d/b/a Hollywood Peepshows, FOURTEENTH ST. ENTERPRISES INC., d/b/a All Male Adult Video, FUN CITY VIDEO CORP., G & D MERCHANDISE CORP., d/b/a Peepland, GOTHAM EXHIBITOR INC., d/b/a Peep O Rama, HELEN WOLFF LTD., d/b/a Come Again, I.S. SULTARS INC., J & J TUMMY YUMMIES CORP., d/b/a Naked City, JGJ MERCHANDISE CORP., d/b/a Peepland/Valentina's II, JHM VIDEO CORP., JUM OPERATING CORP., d/b/a Peepland, JVR VIDEO CENTER INC., d/b/a Playground, KINEMATICS MERCHANDIZING & DISTRIBUTORS, INC., d/b/a

Kinematics, KISMA VIDEO, INC., L & T VIDEO, INC., d/b/a Badlands Adult Video, MADELINE D'ANTHONY ENT. INC., d/b/a Harmony Theatre, MANHATTAN VIDEO INC., MARQUIS VIDEO INC., d/b/a Marquis Video, MIRAGE PRODUCTIONS, INC., d/b/a Love Shack, MONTANA HOLDINGS INC., d/b/a Runway 69, NAWAN ENTERTAINMENT INC., d/b/a Euro World, NILUPUL VIDEO INC., N.R.S. VIDEO INC., NY VIDEO INC., d/b/a Love Shack, PABON THEATRE CORP., d/b/a Eros Theatre, PEREGRINE ENTERPRISES, INC., d/b/a Paradise Club, R.E.J.M., INC., d/b/a Big Top, RON BOB PUB INC., d/b/a Gallagher's, SAMI'S VIDEO WAREHOUSE, d/b/a Warehouse on the Block, LTD, SERENDIB VIDEO INC., d/b/a Serendib Video, SPH VIDEO CORP., STAR DISTRIBUTORS, LTD, STATEWIDE VIDEO INC., STEAM HEAT INC., STS VIDEO INC., d/b/a Adult Video, SUEMAR VIDEO, INC., d/b/a Goodtime Video, THIRD AVENUE ENTERTAINMENT INC., d/b/a XXX Video, THUNDER VIDEO INC., TOWN VIDEO SALES, INC., d/b/a Les Hommes Book Shop, VIDEO, VIDEO, VIDEO, INC., VIDEO 30 OF QUEENS INC., d/b/a Ecsxxxtasy Video, WEST VIDEO INC., ZIDEO VIDEO INC., 21 ANN STREET CORP., d/b/a Ann Street Adult Entertainment, 130 C STREET CORP., d/b/a Christopher Street Book Shop, 155 VIDEO CENTER CORP., d/b/a Peep-world, 300 BOOK CENTER, 303 W. 42ND STREET ENTERPRISES INC., d/b/a Show World, 323 CANAL ST., INC., 325 W. 45TH ST. REST. CORP., d/b/a Private Eyes, 35-30 38th St. Corp., d/b/a Cityscape, 412 8TH AVE. CORP., d/b/a Nude New York City, 45-08 VERNON BLVD. CORP., d/b/a Riverhead Inn, 603 VIDEO INC., 610 VIDEO STORE INC., 691 8TH AVENUE CORP., 691 VIDEO CENTER CORP., 693 VIDEO CORP., d/b/a TNL Video, 711 ASSOCIATES LTD., d/b/a Peepland, 729 6TH AVENUE CORP., d/b/a Billy's Topless, 733A CORP., d/b/a Video Palace, 763 VIDEO STORE INC., 777-779 8TH AVE. CORP., d/b/a Hollywood Twin, 81-22 BAXTER AVE. LOUNGE INC., d/b/a ILDA's Place II,

Plaintiffs-Appellants.

v.

THE CITY OF NEW YORK, HON. RUDOLPH W. GIULIANI, as Mayor of the City of New York, JOSEPH B. ROSE, as Director of City Planning, Department of City Planning of the City of New York, and GASTON SILVA, as Commissioner of Buildings, Department of Buildings of the City of New York,

Defendants-Appellees,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, BELLAIRE/BELL-VILL CIVIC ASSOCIATION, BNOS ISRAEL GIRLS' SCHOOL, BOWNE PARK CIVIC ASSOCIATION, BRIARWOOD COMMUNITY ASSOCIATION, BRONX COMMUNITY BOARD #12, BROOKLYN CIVIL COUNCIL, BROOKLYN TENANTS COUNCIL, CARDINAL SPELLMAN HIGH SCHOOL, COALITION OF UNITED RESIDENTS FOR A SAFER ENVIRONMENT, COLLEGE POINT BOARD OF TRADE, COMMITTEE FOR A BETTER AND SAFER NOSTRAND AVENUE, COMMUNITIES OF MASBETH AND ELMHURST TOGETHER, COMMUNITY SCHOOL DISTRICT 21 PRESIDENTS' COUNCIL, CONGREGATION BNAI SHLOIMA ZALMAN, CROWN HEIGHTS TAXPAYERS AND CIVIC ASSOCIATION, DOUGLASTON CIVIC ASSOCIATION, EAST MIDWOOD NEIGHBORHOOD ASSOCIATION, COUNCILMEMBER ANDREW ERISTOFF, GRAND CENTRAL PARTNERSHIP, HOLLISWOOD CIVIC ASSOCIATION, HUDDE JUNIOR HIGH SCHOOL PARENTS ASSOCIATION, JACKSON HEIGHTS COMMUNITY DEVELOPMENT CORPORATION, KINGS HIGHWAY DISTRICT MANAGEMENT ASSOCIATION, KINGSWAY JEWISH CENTER; LAWYERS' COMMITTEE ON VIOLENCE, MANHATTAN TERRACE CIVIC ASSOCIATION, COUNCILMEMBER HELEN MARSHALL, MIDWOOD CIVIC ACTION COUNCIL INC., NEW NORTHERN BOULEVARD BUSINESS ASSOCIATION, NORTHERN BOULEVARD MERCHANTS' ASSOCIATION, 100-299 EAST 77TH STREET BLOCK ASSOCIATION, PROSPECT PARK YESHIVA, QUEENS BRADDOCK CIVIC ASSOCIATION, QUEENS VILLAGE CIVIC ASSOCIATION, REAL ESTATE BOARD OF NEW YORK, RESIDENTS AGAINST STREET PROSTITUTION, ROSEDALE BLOCK ASSOCIATION, ROSEDALE CIVIC ASSOCIATION, COUNCILMEMBER JOHN SABINI, 34TH STREET PARTNERSHIP, UNITED CIVIC COUNCIL OF QUEENS, UNITED COMMUNITY CIVIC ASSOCIATION, COUNCILMEMBER

ANTHONY WEINER, WEST 45TH STREET BLOCK ASSOCIATION, WEST 47TH/WEST 48TH STREET BLOCK ASSOCIATION and WEST 90'S/WEST 100'S NEIGHBORHOOD COALITION,

Defendants-Respondents-Intervenors-Appellees.

Before: VAN GRAAFEILAND, MESKILL, and CABRANES, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*) denying plaintiffs' motion for a temporary restraining order and preliminary injunction to stay the enforcement of an amendment to the Zoning Resolution of the City of New York that regulates the zoning of "adult establishment[s]." The district court concluded that plaintiffs were collaterally estopped from relitigating in federal court the same issues that were decided against them in the prior litigation of their state constitutional claims in state court.

Affirmed.

HERALD PRICE FAHRINGER, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP, New York, NY (Erica T. Dubno, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP; J. Michael Murray, Berkman, Gordon, Murray & DeVan, of counsel), *for Plaintiffs-Appellants Amsterdam Video, Inc., et al.*

BETH HAROULES, New York Civil Liberties Union Foundation, New York, NY (Arthur N. Eisenberg, Norman Siegel, New York Civil Liberties Union Foundation, of counsel), *for Plaintiffs-Appellants Rachel Hickerson, et al.*

LEONARD J. KOERNER, Office of the Corporation Counsel of the City of New York, New York,

NY (Michael D. Hess, Corporation Counsel of the City of New York, Gabriel Taussig, Elizabeth S. Natrella, of counsel), *for Defendants-Appellees.*

FREDERICK A.O. SCHWARZ, Jr., Cravath, Swaine & Moore, New York, NY, *for Defendant-Respondent-Intervenor-Appellee Times Square Business Improvement District*

WAYNE A. CROSS, Dewey Ballatine LLP, New York, NY, *for Defendants-Respondents-Intervenors-Appellees Center for the Community Interest, et al.*

JOSÉ A. CABRANES, *Circuit Judge:*

This case concerns an amendment to the Zoning Resolution of the City of New York (the "Zoning Amendment") regulating the zoning of "adult establishment[s]," as defined by the Zoning Amendment. The principal provisions of the Zoning Amendment limit the permissible locations of adult establishments to non-residential districts[1] and require that they be located – within the districts in which they are permitted – at least 500 feet away from any school, day care center, or house of worship; at least 500 feet from excluded districts; and at least 500 feet from one another. Plaintiffs in these consolidated cases are patrons and owners of adult establishments

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[1] Even prior to the passage of the Zoning Amendment, New York City's Zoning Resolution prohibited new commercial development in residentially zoned districts. Under the Zoning Amendment, adult establishments are also barred from certain districts that are zoned for commercial and manufacturing uses, but that permit new residential development as well.

within New York City who claim that the Zoning Amendment violates their rights to free expression under Article I, § 8 of the New York State Constitution and the First Amendment of the United States Constitution. In a case involving a different set of plaintiffs, we recently upheld the Zoning Amendment against facial federal constitutional challenges under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *See Buzzetti v. City of New York*, ___ F.3d ___, 1998 WL 130866 (2d Cir. Mar. 20, 1998).

The factual background of the Zoning Amendment is detailed both in Buzzetti and in prior state and federal decisions arising from the instant litigation, with which we assume familiarity. *See Hickerson v. City of New York*, ___ F. Supp. ___, 1998 WL 105583 (S.D.N.Y. Mar. 6, 1998); *Hickerson v. City of New York*, 932 F. Supp. 550 (S.D.N.Y. 1996); *Stringfellow's of New York, Ltd. v. City of New York*, 171 Misc.2d 376, 653 N.Y.S.2d 801 (N.Y. Sup. Ct. 1996), *aff'd*, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, ___ N.Y.2d ___, 1998 WL 77749 (N.Y. Feb. 24, 1998). The instant appeal is from an order of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*), dated March 6, 1998, which denied plaintiffs' motion for a temporary restraining order and a preliminary injunction to stay the enforcement of the Zoning Amendment.[2] Although at the heart

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[2] During the prior state-court proceedings, the enforcement of the Zoning Amendment was stayed by court order. The stay was terminated by Judge Cedarbaum's March 6, 1998 order denying plaintiffs' application for a preliminary injunction. Judge Cedarbaum stayed her order until March 11, 1998, to allow plaintiffs to seek a stay in this Court. Judge Walker

of this litigation is a controversy over free expression, plaintiffs have already presented their free-speech claims to the New York courts. The only question before us is whether the New York courts' rejection of plaintiffs' state constitutional claims forecloses plaintiffs from relitigating, in the form of a First Amendment claim in federal court, the same issues that were resolved against them in state court. We agree with the district court that the "full faith and credit" statute prevents a federal court from revisiting the same issues that were decided against plaintiffs by the New York state courts, which provided plaintiffs with a full and fair opportunity to litigate these issues. Accordingly, we affirm.

I.

We review the district court's denial of a preliminary injunction for an abuse of discretion. *See Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996). "It is by this time black-letter law that the party seeking a preliminary injunction must establish that: (1) absent injunctive relief, it will suffer an irreparable injury; and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tips in favor of the movant." *Alliance Bond Fund, Inc. v. Grupo*

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extended the stay to March 11, 1998 so that the issue could be considered by a three-judge panel, and the panel ordered the appeal to be expedited and extended the stay through the hearing of the expedited appeal. At oral argument of this expedited appeal on April 29, 1998, we extended the stay until further order of this Court.

Mexicano de Desarrollo, S.A., ___ F.3d ___, 1998 WL 220954, at *9 (2d Cir. May 6, 1998). "Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction." *Bery*, 97 F.3d at 693. Because we conclude, however, that plaintiffs are collaterally estopped from relitigating the issues that govern their First Amendment claim, they can show neither "a likelihood of success on the merits" nor "sufficiently serious questions going to the merits to make them a fair ground for litigation."

Under the full faith and credit statute, 28 U.S.C. § 1738,[3] "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984) (noting that § 1738 "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims"); *see generally Montana v. United States*, 440 U.S. 147, 153 (1979) ("A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit

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[3] 28 U.S.C. § 1738 provides, in pertinent part, that state court determinations "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

between the same parties or their privies. . . . ' ") (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897) (ellipses in original)). New York law provides that an issue may not be relitigated if the identical issue was necessarily decided in a previous proceeding, provided that the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior action. *See, e.g., In re Sokol*, 113 F.3d 303, 306 (2d Cir. 1997); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500-01, 478 N.Y.S.2d 823, 826-27, 467 N.E.2d 487, 490-91 (1984).

We agree with the district court that the issues decided and the standards applied by the New York state courts in rejecting plaintiffs' state constitutional challenge are the same that would be applicable to plaintiffs' First Amendment claim. Under both the federal and state Constitutions, the Zoning Amendment must: (1) be "content neutral," in the sense that it is aimed not at the restricted speech itself but at the negative secondary consequences that flow from it; (2) serve substantial government interests and be no broader than necessary to serve these interests; and (3) leave open reasonable alternative avenues of communication. *Compare City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50 (1986), *with Stringfellow's of New York, Ltd. v. City of New York*, ___ N.Y.2d ___, 1998 WL 77749, at *5 (N.Y. Feb. 24, 1998). The New York Court of Appeals unanimously held that the Zoning Amendment met these standards – just as this Court in *Buzzetti* found the Zoning Amendment constitutionally unobjectionable on the record then before us – and this determination is equally dispositive of plaintiffs' claim under the First Amendment. *Cf. Kremer v. Chemical Construction*

Corp., 456 U.S. 461, 479-80 (1982) (holding, in Title VII case, that "[a]lthough the claims presented to the NYHRD [New York State Division of Human Rights] and subsequently reviewed by the Appellate Division were necessarily based on New York law, the alleged discriminatory acts are prohibited by both federal and state laws. The elements of a successful employment discrimination claim are virtually identical; petitioner could not succeed on a Title VII claim consistently with the judgment of the NYHRD that there is no reason to believe he was terminated or not rehired because of age or religion. The Appellate Division's affirmance of the NYHRD's dismissal necessarily decided that petitioner's claim under New York law was meritless, and thus it also decided that a Title VII claim arising from the same events would be equally meritless." (footnotes omitted)).

Plaintiffs do not deny that the state and federal standards are nominally the same in all material respects, but rather argue that the standards are applied differently in state and federal court. In particular, plaintiffs contend that federal courts require greater proof from municipalities that the non-speech-related government interests at stake are substantial and that reasonable alternative avenues of communication remain available. We note that this contention is in stark contrast to plaintiffs' repeated assertions in earlier stages of this litigation that New York courts apply more favorable standards to their free-speech claims than federal courts. In any event, apart from their recent vintage, plaintiffs' arguments are mistaken.

A. Substantial Government Interests

With respect to the substantiality of New York's non-speech-related interests in the Zoning Amendment, the New York Court of Appeals observed that "the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City." *Stringfellow's*, ___ N.Y.2d at ___, 1998 WL 77749, at *6. The court then reviewed in detail this legislative record, which included studies by the Times Square Business Improvement District, the Chelsea Action Coalition and Manhattan Community Board 4, and the Department of City Planning ("DCP"). Each of these studies linked the presence of adult establishments to increased crime and decreased property values. *See id.* at *6-7.[4] The court also noted that, apart from the City's own studies, the legislative record contained the conclusions of studies conducted by city councils and town boards throughout the country, which also showed a correlation between adult establishments and negative secondary effects such as

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[4] Although plaintiffs argue on appeal that the DCP's own study suggests no correlation between adult establishments and the negative secondary effects identified by the City, the New York Court of Appeals took account of, and rejected, this very argument, observing that "[a]lthough the DCP acknowledged that its analysis of the hard data regarding the relationship between adult uses and urban ills did not yield conclusive results, a reading of its report as a whole indicates that the negative perception of adult enterprises held by the business community and the public itself results in disinvestment, with the concomitant deterioration in the social and economic well-being of the surrounding area." *Id.* at *7.

increased crime, depressed real estate markets, and an overall decline in the quality and character of surrounding neighborhoods. *See id.* Finally, the court rejected plaintiffs' complaints about the sufficiency of the evidence, holding that it was entirely appropriate to rely on studies from other jurisdictions – particularly in light of the fact that City officials had considered the comparability and reliability of these studies – and that the "non-empirical" nature of some of the City's evidence (*i.e.*, from surveys of businesses and real-estate brokers) did not render it valueless or insubstantial. *See id.* at *8.

Plaintiffs now raise the same objections to the City's evidence that were rejected by the New York Court of Appeals, and despite that court's thorough review and analysis of the legislative record, plaintiffs claim that federal law requires the City to provide greater evidence of negative secondary effects than the New York courts required. Accordingly, plaintiffs contend that they are not estopped from relitigating the sufficiency of the City's evidence under this allegedly more stringent federal standard. In arguing that a more stringent standard exists, plaintiffs rely almost exclusively on *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997) (en banc), a case that provides no support whatsoever for their position. *Phillips* was an adult-use zoning case in which the Third Circuit required additional evidentiary support for a zoning ordinance that had been upheld by the district court "(1) without an answer from the defendants identifying the secondary effects alleged to justify the burden on expression, and (2) without a record supporting the reasonableness of any legislative expectations regarding the likelihood of these secondary effects and the ameliorative

effect of the ordinance." *Id.* at 173. The Third Circuit noted that, whereas in Renton the Supreme Court had considered the City of Renton's legislative record to be adequate where it consisted solely of studies from other cities that could reasonably be deemed relevant, "[h]ere, the district court had no way of knowing what problem or problems the Borough thought it was facing and there is no study or other evidence in the record concerning the secondary effects of 'adult entertainment uses.' " *Id.* at 174. In order to avoid "reduc[ing] the First Amendment to a charade in this area," *id.* at 175, the Third Circuit required the Borough at least to "identify" the secondary effects with some particularity, and to "offer some record support for the existence of those effects," *id.* Far from suggesting that federal law would require more exacting scrutiny of the legislative record than was undertaken by the New York courts in this case, *Phillips* stands for nothing more than the unremarkable proposition that a barren legislative record will not suffice under the First Amendment – a proposition which is unhelpful to plaintiffs, in light of the fact that the legislative record in the present case is quite extensive, as the state courts recognized.

In any event, quite apart from the fact that we find no merit in plaintiffs' argument that the federal standard for judging the substantiality of New York's non-speech-related interests is stricter than the state standard, this Court, in *Buzzetti*, has already considered and rejected the argument that the legislative record is inadequate, as a matter of federal law, to support the City's legitimate and substantial interests in the Zoning Amendment. As we stated in *Buzzetti:*

> *Renton* emphasized that city officials were not required to make particular findings regarding the secondary effects of adult entertainment in Renton itself, but rather were "entitled to rely on the experiences of . . . other cities." *Renton*, 475 U.S. at 51, 106 S.Ct. at 931; *see id.* at 51-52, 106 S. Ct. at 931 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."). Thus, New York City's reliance on studies from a variety of other areas of the country was well-placed. But . . . New York City went beyond this minimal requirement: the DCP conducted its own detailed study, consulted other studies conducted in particular neighborhoods of New York City, and considered testimony given at public hearings in New York.

___ F.3d at ___, 1998 WL 130866, at *7 (first ellipsis in original). Accordingly, it is clear that there is no basis for allowing plaintiffs to relitigate this issue in federal court.

B. Alternative Avenues of Communication

Plaintiffs' argument that federal courts apply a more stringent standard than the New York courts applied to determine whether there are "reasonable alternative avenues of communication" is also unavailing. Indeed, the New York Court of Appeals summarized the standard that federal courts have applied, and proceeded to apply that very standard as the basis for its inquiry under the

state Constitution. The court's discussion merits quotation at length:

> Relying on a formula derived from *City of Renton v. Playtime Theatres* . . . , the federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads" (*id.*, at 53-54. Under Renton, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry (*see, City of Renton v. Playtime Theatres,* [475 U.S.] at 53, *Woodall v. City of El Paso,* 49 F.3d 1120, 1124-25 [(5th Cir.)], *cert*[.] *denied*[,] ___ U.S. ___, 116 S.Ct. 516 [(1995)]; *Grand Brittain, Inc. v. City of Amarillo, Tex.,* 27 F[.]3d 1068, 1070 [(5th Cir. 1994)]; *see also, Town of Islip v. Caviglia,* [73 N.Y.2d 544,] 555, 560 [(1989)] (areas of a municipality set aside for adult uses need not be prime locations)). Rather, the inquiry is limited to the *physical* and *legal* availability of alternative sites within the municipality's borders and whether those sites are part of an actual business real estate market (*see, Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1530-31 [(9th Cir. 1993)], *cert*[.] *denied*[,] 511 U.S. 1030 [(1994)]; *see also, Woodall v. City of El Paso, supra; Alexander v. City of Minneapolis,* 928 F.2d 278 [(8th. Cir. 1991)].)

> In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (*see* [*Topanga*], 989 F.2d at 1531). Notably, these considerations dovetail nicely with *Islip's* requirement that there be "ample space available for adult uses after the rezoning" and no showing of a substantial reduction in the total number of adult outlets or the accessibility of those outlets to their potential patrons (73 N.Y.2d at 555, 560). With these considerations as a backdrop, we turn now to the specific facts and contentions presented here.

Stringfellow's, ___ N.Y.2d at ___, 1998 WL 77749, at *9-10.

Significantly, the two cases most heavily relied upon by plaintiffs in arguing that federal law imposes more of an evidentiary burden on the City to prove the availability and suitability of alternative sites than the New York state courts imposed – *Topanga Press, Inc. v. City of Los Angeles and Woodall v. City of El Paso* – were cited and relied upon by the New York Court of Appeals. Forced to acknowledge this fact, which strongly suggests that the state court was not answering a different question or applying a standard less favorable to plaintiffs than federal courts would apply, plaintiffs argue that while "the New York Court of Appeals did refer to the *Topanga* and *Woodall* decisions [, a]nd . . . did suggest that the City was obligated to demonstrate 'the *physical* and *legal* availability of alternative sites. . . . and whether those sites are

part of the actual business real estate market[,]' . . . there is a serious analytic gap between this language . . . and the factual record developed in the state trial court." Brief of Hickerson Appellants at 31-32. Plaintiffs argue, in other words, that while the New York Court of Appeals purported to be making the same determination that a federal court would make under federal law to determine the availability of "reasonable alternative avenues of communication," plaintiffs should not be collaterally estopped from relitigating this issue because the "serious analytic gap" between the evidence and the recited standard belies any conclusion that federal standards were genuinely applied.

We find no such "serious analytic gap," nor any reason to doubt that the New York Court of Appeals answered the same question that would be dispositive under federal law. Plaintiffs' primary argument to the contrary is that federal law requires municipalities to identify the *specific* physically and legally available relocation sites. Plaintiffs have produced an affidavit from a land-use planning consultant, Robert McLaughlin (the "McLaughlin Affidavit" or "Affidavit"), which asserts that some of the land identified by the City as available for relocating adult establishments is not realistically available, for a variety of reasons – some of the land, for example, is allegedly occupied by "oil tank farms" and structures including "numerous and large facilities of the New York City Sanitation Department." McLaughlin Affidavit at 24, 26. Unless the City can precisely identify the "physically and legally available" sites to which the approximately 147 adult establishments that will need to relocate can move, plaintiffs argue, the City

has not carried its burden of proving that "reasonable alternative avenues of communication" exist under federal law.

Plaintiffs' argument suffers from several flaws. First, we are aware of no federal case, and plaintiffs direct our attention to none, that requires municipalities to identify the exact locations to which adult establishments may relocate, as opposed to identifying the general areas that remain available and proving that such areas contain enough potential relocation sites that are "physically and legally available" to accommodate the adult establishments. This is precisely the standard of proof to which the New York Court of Appeals held the City. Clearly then, to second-guess that court's determination of this issue would violate the full faith and credit statute.

After observing that "it is incumbent upon the municipal defendants to demonstrate that sufficient alternative receptor sites are available," *Stringfellow's*, ___ N.Y.2d at ___, 1998 WL 77749, at *10, the New York Court of Appeals noted the City's evidence that, after excluding land identified by the City as being encumbered by properties unlikely to be developed for commercial use, 4% of the total land area of the City remained open to adult establishments. Maps prepared by the City reflected that, after factoring in the Zoning Amendment's 500-foot buffer zones, over 500 potential sites remained available. *See id.* Further, the New York Court of Appeals considered the City's evidence that the zoning districts left open to adult establishments "permit a wide mix of commercial, retail, entertainment and manufacturing uses," *id.*, and that all of these areas in Manhattan and 80% of the areas in the other boroughs of New York are within a ten-

minute walk from a subway line or major bus route, *see id.*[5]

The court did not ignore plaintiffs' evidence – namely, the McLaughlin Affidavit – that portions of the 4% of "unencumbered" land identified by the City were not realistically available, but rather found this evidence insufficient to raise a material question of fact regarding the availability of "reasonable alternative avenues of communication." The court partially discredited the McLaughlin Affidavit because McLaughlin considered land to be "unavailable" that, under *Renton*, is not to be excluded – such as industrial areas, undeveloped land, and warehouse areas. *See Renton*, 475 U.S. at 53-54 (finding available land to be adequate where it included "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space," and observing that the fact that the establishments "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation"); *see also, e.g., Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d at 1069-70 (holding that adult-use zoning ordinance provided reasonable alternative avenues of communication even though 90% of prospective sites were on undeveloped land). The court also

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[5] The accessibility of potential sites in the so-called "outer boroughs" disposes of plaintiffs' argument – which, in any event, is without foundation and unsupported by case law – that in contrast to the state courts' analysis, the First Amendment requires proof of adequate available sites on a borough-by-borough basis.

recognized that while the McLaughlin Affidavit identified, within the 4% of purportedly "unencumbered" land identified by the City, specific sites that were clearly not realistically available, this was insufficient to cast doubt upon the availability of "reasonable alternative avenues of communication" where the City had produced evidence showing that this land could accommodate over 500 establishments under the terms of the Zoning Amendment, approximately *three times* the number of establishments that currently exist:

> The most significant flaw in McLaughlin's affidavit . . . is the absence of any attempt to quantify his observations or to make concrete allegations as to precisely how many of the 500 potential receptor sites identified by defendants were, in his estimate, unavailable.[6] To be sure, the affidavit lists a significant number of sites that are pragmatically unavailable because their current uses are so entrenched that they are unlikely to become part of the commercial real estate market in the foreseeable future. Included in this category are such diverse sites as those

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[6] McLaughlin subsequently did quantify, in a new but substantially similar affidavit submitted to the district court, the number of sites he considered to be realistically available (90). However, in light of our agreement with the district court that plaintiffs had a full and fair opportunity to present evidence in state court, *see infra*, this belated submission does not affect our collateral estoppel inquiry. "A party . . . cannot avoid issue preclusion simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first." 18 James Wm. Moore, et al., Moore's Federal Practice § 132.02(2)(d), at 132-26 (3d ed.1998); *see, e.g., Yamaha Corp. v. United States*, 961 F.2d 245, 254-55, 257 (D.C.Cir.1992), cert. denied, 506 U.S. 1078 (1993).

> that house the northern half of Federal Plaza in Manhattan, the Clay Pit Ponds State Park Preserve in Staten Island, a New York City fire house in Brooklyn and a United Parcel Service facility in Queens. However, McLaughlin's criticisms about various individual sites do not provide an adequate counter to defendants' supported claim that within the available acreage as a whole there are more than enough receptor sites to accommodate the existing adult entertainment industry.

Stringfellow's, ___ N.Y.2d at ___, 671 N.Y.S.2d 406, 694 N.E.2d 407, 1998 WL 77749, at *11; *see also Stringfellow's*, 171 Misc.2d at 396, 653 N.Y.S.2d at 814 ("Even if the City's estimate overstates the number of potentially viable relocation sites, there still remains ample space for more than the existing numbers of adult establishments. . . . [N]othing in *Renton*, *Islip* or any existing case law requires the City to identify specific sites that are actually available."); *cf. Woodall v. City of El Paso*, 49 F.3d at 1126 (stating, in response to complaints by adult establishments as to the viability of particular sites, that "even if we agreed that . . . these sites suffered from defects so severe as to take them out of the commercial real estate market and render them physically unavailable, there was no evidence that surrounding sites suffered from the same impediments so as to render them likewise unavailable").

In sum, there is no reason to doubt that the New York Court of Appeals applied the same standard and answered the same questions that apply under federal

law in determining whether the Zoning Amendment provided for "reasonable alternative avenues of communication." The argument that federal law would have required the City to identify the precise sites to which adult establishments could relocate is not only unsupported by any federal case law, but is belied by our recent decision in *Buzzetti*. In *Buzzetti*, far from suggesting that the City's evidence was inadequate because it was not site-specific, we held that "there can be no doubt on this record that the Zoning Amendment allows for reasonable alternative avenues of communication." ___ F.3d at ___, 1998 WL 130866 at *8 (internal quotation marks omitted). Although we did not have the McLaughlin Affidavit before us in *Buzzetti*, the McLaughlin Affidavit is only relevant to whether plaintiffs have produced enough counter-evidence to cast doubt on the City's evidence, and it does not change the fact that under federal law the City was not required to identify precise relocation sites in order to prove the existence of "reasonable alternative avenues of communication." The state courts' determination that the McLaughlin Affidavit did not cast sufficient doubt on the City's evidence to preclude summary judgment – based largely on the Affidavit's failure to quantify the number of feasible sites, its reliance on premises that were invalid under *Renton*, and the persuasiveness of the City's own evidence – does not, in short, represent a departure from federal standards. The full faith and credit statute therefore bars plaintiffs from relitigating the issue of alternative sites in federal court.

C. *Plaintiffs' Opportunity to Litigate the Issues in State Court*

Collateral estoppel will only apply if plaintiffs had a "full and fair opportunity" in New York state court to litigate the issues that they now seek to relitigate in federal court. *See In re Sokol*, 113 F.3d at 306; *Ryan*, 62 N.Y.2d at 501, 478 N.Y.S.2d at 826, 467 N.E.2d at 490. Plaintiffs, as the parties opposing the application of collateral estoppel, bear the burden of proving that they were denied this full and fair opportunity. *See In re Sokol*, 113 F.3d at 306; *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 456, 492 N.Y.S.2d 584, 588, 482 N.E.2d 63, 67 (1985). Under New York law, "[a] determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of the realities of the [prior] litigation, including the context and other circumstances which . . . may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him." *Ryan*, 62 N.Y.2d at 501, 478 N.Y.S.2d at 827, 467 N.E.2d at 491 (internal quotation marks and citation omitted; alterations in original). Included among the factors to be considered are "the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, [and] the competence and expertise of counsel." *Id.* Substantially for the reasons stated by Judge Cedarbaum, we believe that plaintiffs have not met their burden of proving that they were denied a full and fair opportunity to litigate their claims in state court. *See Hickerson*, ___ F.Supp. at ___, 1998 WL 105583, at *5-6.

Accordingly, because the same issues decided by the state courts are dispositive of plaintiffs' claims under the First Amendment, and because plaintiffs had a full and fair opportunity to litigate these issues in state court, they are collaterally estopped from relitigating them in federal court.

II.

Plaintiffs argue that they are not precluded from litigating their First Amendment claim in federal court because they informed the state court, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), that they intended to reserve the right to litigate their federal claims in federal court. *England* held that, after a federal court has abstained under the doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), in order to obtain an authoritative interpretation of state law that could potentially moot or influence the federal constitutional questions presented, parties who have been remitted to state court against their will are not forced to litigate their federal claims there, but may reserve the right to a federal adjudication of these claims. *See* 375 U.S. at 421-22. The Supreme Court in *England* stated its "fundamental objections to any conclusion that *a litigant who has properly invoked the jurisdiction* of a Federal District Court to consider federal constitutional claims can be *compelled, without his consent and through no fault of his own,* to accept instead a state court's determination of those claims." *Id.* at 415 (emphasis added).

Consistent with *England's* focus on the problem of depriving a litigant who has "invoked" the jurisdiction of a federal court from being deprived of that choice "without his consent and through no fault of his own," the Supreme Court appeared to suggest in a subsequent case that an *England* reservation would only be available when the federal courts were a litigant's initial forum of choice. *See Allen v. McCurry*, 449 U.S. 90, 101 n. 17 (1980) (characterizing *England* as applying "[w]here a plaintiff properly *invokes federal-court jurisdiction in the first instance* on a federal claim" (emphasis added)). A similar suggestion was made in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 84-85 & n. 7 (1984). The question in *Migra* was whether litigants who could have, but did not, raise certain claims in their state case were precluded from raising those claims in a subsequent § 1983 suit in federal court. The Court held that such litigants were indeed so precluded, and relied heavily on the fact that such litigants voluntarily chose to proceed initially in state court. The petitioner in *Migra*, the Court observed, did "not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court." *Id.* at 84-85. Having emphasized the voluntariness of the decision to file suit initially in state court, the Court then carefully noted that *England* provides a way for plaintiffs to return to federal court after a district court has abstained. *See id.* at 85 n. 7. By contrasting *England* with the situation in which a plaintiff has chosen to file suit in state court even though

he could have sought an adjudication of his federal constitutional claims in federal court, *Migra* can be read to suggest that *England* was not aimed at litigants who initially brought suit in state court. *Cf. Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1306 (11th Cir.1992) ("The *Migra* Court made clear that *England* could apply when a litigant with a federal constitutional claim is *involuntarily* in state court." (emphasis added)).

In the instant case, plaintiffs did not invoke the jurisdiction of the federal court in the first instance, only to have the court invoke Pullman abstention. Instead, they filed suit in state court, which they believed would look upon their free-speech claims more favorably. Moreover, after defendants removed the case to federal court, plaintiffs moved to remand the case in its entirety (including their First Amendment claim) to state court, arguing that the case was not properly removable and also vigorously urging that their state constitutional claims "predominate[d]," while their First Amendment claim was a mere "adjunct" or "supplement." See Affirmation on Behalf of Amsterdam Video Plaintiffs, in Support of Motion to Remand, dated April 26, 1996 (United States District Court for the Southern District of New York, No. 96 Civ. 2204), in Joint Appendix at 227. The district court, in response to plaintiffs' motion, abstained under Pullman and remitted the state claims to state court, but denied plaintiffs' request to remand the federal constitutional claims and instead stayed these claims pending the outcome of the state litigation. *See* 932 F.Supp. at 551. Only then did plaintiffs file an *England* reservation.

Under these circumstances, plaintiffs cannot meaningfully be said to have been deprived of a federal forum

for their federal claims "without [their] consent and through no fault of [their] own." *England*, 375 U.S. at 415. If *defendants* had not sought to avail themselves of a federal forum after plaintiffs filed suit in state court, plaintiffs would have been held to their choice of forum and would have been required to submit their First Amendment claim to the New York state courts. The same would have been true if plaintiffs had been successful in moving to remand the entire case to state court. Alternatively, if plaintiffs' priority had been to obtain a federal forum for their First Amendment claim, they could have filed suit in federal court initially. *Cf. Migra*, 465 U.S. at 84-85 & n. 7. In light of *England's* emphasis on the need to preserve access to a federal forum *for those litigants who have chosen it*, and in light of the suggestive characterizations of *England* by the Supreme Court in the later cases of *Allen v. McCurry and Migra*, we agree with those courts that have held that *England* applies only to litigants who have sought to proceed in federal court in the first instance, and not to litigants such as the instant plaintiffs who voluntarily chose to file suit in state court. *See Peduto v. City of North Wildwood*, 878 F.2d 725, 729 n. 5 (3d Cir.1989) ("[A]s plaintiffs here invoked the jurisdiction of the state court in the first instance, the application of *England* has no relevance here."); *Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir.1988) (*England* "does not apply where the plaintiff voluntarily chooses to pursue a state action first."); *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 312 (1st Cir.1986) ("In order to make an *England* reservation, a litigant must establish its right to have its federal claims adjudicated in a federal forum by properly invoking the jurisdiction of the federal court in the first

instance."); *cf. Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d at 1304-05 (considering itself bound by predecessor-circuit decision, *Jennings v. Caddo Parish Sch. Bd.*, 531 F.2d 1331, 1332 (5th Cir.), *cert. denied*, 429 U.S. 897 (1976), allowing plaintiffs to file *England* reservation prior to bringing suit in federal court, but noting that "Jennings effectively abolishes the first requirement for an *England* reservation – filing in the first instance in federal court. Thus, it appears that the Jennings panel misread *England*, effectively rewriting the requirements for a valid *England* reservation."); *see generally* 17A Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4243, at 6 (1998 Pocket Part) ("The *England* procedure strictly speaking is applicable only if a case was begun in federal court.").

We are not persuaded that a contrary result is required by footnote 13 of *England*, which contains some broad language seized upon by plaintiffs, but which we read simply to indicate that an *England* reservation is available not only to plaintiffs, but also to defendants who have removed the case to federal court, only to have the district court abstain. Footnote 13 states:

> The reservation may be made by any party to the litigation. Usually the plaintiff will have made the original choice to litigate in the federal court, but the defendant also, by virtue of the removal jurisdiction, 28 U.S.C. § 1441(b), has a right to litigate the federal question there. Once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question. Thus, while a plaintiff who unreservedly litigates his federal claims in

> the state courts may thereby elect to forgo his own right to return to the District Court, he cannot impair the corresponding right of the defendant. The latter may protect his right by either declining to oppose the plaintiff's federal claim in the state court or opposing it with the appropriate reservation.

England, 375 U.S. at 422 n. 13. Despite plaintiffs' reliance on the statement that "[o]nce issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question," we believe that it is clear, in context, that this footnote was only intended to clarify that *England* applies to defendants as well as plaintiffs, and that the particular language relied upon by plaintiffs was intended simply to clarify that a plaintiff may not, by fully litigating his federal claims in state court, deprive a defendant of his right to return to the federal forum. We do not read this language to render irrelevant a plaintiff's choice to avail himself of state, rather than federal, jurisdiction in the first instance, and we believe such a reading would contravene *England's* emphasis on preserving the federal forum for those who have "invoked" it but have been deprived of it "through no fault of [their] own." *Id.* at 415. Plaintiffs not only voluntarily filed suit in state court, but sought to remand the entire case to state court after it had been removed to federal court by defendants; while footnote 13 of *England*, under these circumstances, would have protected *defendants* from being deprived of their choice of a federal forum, it does not allow defendants' choice of a federal forum to be preserved by *plaintiffs*.

III.

Apart from their reliance on *England*, plaintiffs raise several other arguments as to why collateral estoppel does not apply, each of which is without merit. First, *citing Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), plaintiffs argue that because their federal claim arises under the First Amendment, they are entitled to an independent examination of the record. In First Amendment cases, notwithstanding the "clearly erroneous" standard of factual review set forth in Fed.R.Civ.P. 52(a), "we are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court." *Bery*, 97 F.3d at 693 (citing, *inter alia*, *Bose Corp.*, 466 U.S. at 499). However, this rule only concerns the proper level of *appellate* review, and does not bar the application of collateral estoppel. *See Ferris v. Cuevas*, 118 F.3d 122, 125 n. 3 (2d Cir.1997) (citing *Bose* requirement, but noting, pursuant to finding plaintiffs' First Amendment claims that were not raised in prior state-court proceedings to be barred by *res judicata*, that "[b]ecause our holding today is procedurally based and does not reach the merits . . . we do not conduct this higher level of factual review.").

Plaintiffs also rely on the doctrine that "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana*, 440 U.S. at 159. They argue that such a change occurred when Mayor Rudolph W. Giuliani, one of the defendants in this action, stated at a press conference following the New York Court of Appeals' decision that the Zoning Amendment would "severely limit[ ]" the

places adult establishments could relocate to, and would "reduce the number in the city to something like 20 or 30." Text of Mayor Giuliani's City Hall Press Conference, February 24, 1998, in Joint Appendix at 914. *Montana* makes clear that the exception to collateral estoppel based on intervening changes in the factual record applies only when these changes "significant[ly]" affect the overall complexion of the record. *See* 440 U.S. at 157; 18 James Wm. Moore, *et al., Moore's Federal Practice* § 132.02(2)(e), at 132-27 to 28 (3d ed.1998) (in order to render issue preclusion inapplicable, "a difference in pertinent facts" must be "sufficient to substantially change the issue"). Mayor Giuliani's statements to the press, particularly when compared to the extensive legislative record compiled by the City – whose conclusions actually differ from those stated at Mayor Giuliani's press conference – simply do not meet that standard.

A final point that, in plaintiffs' view, counsels against the application of collateral estoppel, is that Supreme Court review is unavailable with respect to the New York state courts' determination of a question of state law. This argument fails to appreciate that the district court made a determination of federal law – namely, that the issues decided and the standards applied by the New York courts are the same as those that would be dispositive under the First Amendment. If the district court's interpretation of the governing First Amendment standards were mistaken, and if this Court were mistaken in affirming the district court's interpretation of federal law, the Supreme Court would remain free to so find and to order this case to proceed in district court.

IV.

In sum, under the full faith and credit statute and New York's law of collateral estoppel, plaintiffs may not relitigate their First Amendment claim in federal court because the same issues that are dispositive of this claim have already been decided in state court. Plaintiffs had a full and fair opportunity to litigate these issues in state court, and they raise no valid ground for barring the application of the doctrine of collateral estoppel. Accordingly, plaintiffs can show neither "a likelihood of success on the merits" nor "sufficiently serious questions going to the merits to make them a fair ground for litigation," and the district court's denial of plaintiffs' motion for a preliminary injunction was entirely proper. We have considered all of plaintiffs' other arguments, and find them to be without merit. The stay of Judge Cedarbaum's March 6, 1998 order is hereby vacated, the judgment of the district court is affirmed, and the Zoning Amendment may be enforced forthwith.

APPENDIX B

File Cop
U. S. DISTRICT COURT
FILED MAR. 9, 1998
S. D. OF N. Y.
- 80224

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RACHEL HICKERSON, et al.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

OPINION
96 Civ. 2203
(MGC)

AMSTERDAM VIDEO INC., et al.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

96 Civ. 2204
(MGC)

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CEDARBAUM, J.

Plaintiffs in these two actions move for a temporary restraining order and preliminary injunction staying enforcement of Text Amendment N 950384 to the Zoning Resolution of the City of New York (the "Amended Zoning Resolution"), which regulates the zoning of "adult establishments."[1] The motion is denied for the reasons that follow.

In a case in which the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the issuance of a preliminary injunction requires the movant to demonstrate both irreparable harm and a likelihood of success on the merits. *NAACP v. Town of East Haven*, 70 F.3d 219, 223 (2d Cir. 1995). This standard is particularly appropriate where a municipal regulation has been carefully examined by all of the courts of the state, including the highest court, and its validity has been upheld under a state constitution that provides broad protection for individual rights.

A violation of the First Amendment of the Constitution of the United States is itself irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Accordingly, when an injunction is sought to protect First Amendment rights, likelihood of success on the merits and irreparable harm

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[1] Complete descriptions of the Amended Zoning Resolution can be found in this Court's prior opinion, *Hickerson v. City of New York*, 932 F. Supp. 550 (S.D.N.Y. 1996), and in *Stringfellow's of New York, Ltd. v. City of New York*, 653 N.Y.S.2d 801 (N.Y. County 1996), *aff'd*, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, ___ N.Y.S.2d ___, 1998 WL 77749 (N.Y. Ct. App. February 24, 1998).

merge into a single threshold requirement. Preliminary injunctive relief is not warranted in this case because plaintiffs have not shown likelihood of success on the merits.

BACKGROUND

Plaintiffs in the Hickerson action are Manhattan and Bronx residents who allege that they regularly patronize adult establishments. They claim that the Amended Zoning Resolution will prevent them from continuing to patronize the adult establishments they currently frequent, and will reduce significantly the number of alternative establishments available to them. Plaintiffs in the Amsterdam action are owners and operators of business establishments which they allege are adult establishments as defined by the Amended Zoning Resolution. They allege that the resolution will force them to terminate the operation of their businesses and thereby cause them significant economic harm.

Both groups of plaintiffs originally sued in the Supreme Court for New York County, asserting claims of violation of freedom of expression under the New York Constitution and the Constitution of the United States. Defendants, the City of New York and three city officials, removed the actions to this Court because of the federal questions presented by the complaints. Plaintiffs promptly sought to return to the state court by moving to remand the actions in their entirety. On June 27, 1996, plaintiffs' motions to remand were granted in part and denied in part. Under the doctrine of abstention of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), all of plaintiffs' state claims were remanded to New York

County Supreme Court, while the federal claims were stayed pending resolution of the state claims. *Hickerson v. City of New York*, 932 F. Supp. 550 (S.D.N.Y. 1996).

State Court Proceedings

After remand of the state constitutional claims, defendants moved for summary judgment on those claims. Before defendants filed their summary judgment motion, plaintiffs conducted some discovery, including a deposition of Marilyn Mammano, a staff person at the Department of City Planning.

In support of summary judgment, defendants submitted a number of affidavits and virtually the entire legislative record of the Amended Zoning Resolution, including various studies and reports on adult businesses, the records of public hearings related to the Amended Zoning Resolution, and maps purporting to show permissible locations for the operation of adult establishments under the law. In opposition to the defendants' motion, plaintiffs submitted numerous affidavits and legal memoranda, including an extensive affidavit from a land use expert, R. Bruce McLaughlin. McLaughlin's affidavit addressed the availability of alternative sites for the businesses required by the Amended Zoning Resolution to close or relocate. It appears from McLaughlin's affidavit that he had been studying the matter for many months. According to the affidavit, McLaughlin personally visited every one of the more than 500 sites identified by the defendants as available for adult establishments. Moreover, documents attached to the affidavit included an analysis prepared in August

1995, while the Amended Zoning Resolution was under consideration and approximately one year before defendants moved for summary judgment.

On October 23, 1996, Justice Marylin G. Diamond of the New York County Supreme Court granted defendants' motion for summary judgment on plaintiffs' state constitutional claims. *Stringfellow's of New York, Ltd. v. City of New York*, 653 N.Y.S.2d 801 (N.Y. County 1996), *aff'd*, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, 671 N.Y.S.2d 406, 1998 WL 77749 (N.Y. Ct. App. February 24, 1998). Justice Diamond found that the Amended Zoning Resolution was not an attempt to regulate speech but rather was motivated by concerns other than those related to speech, and, in particular, by a reasonable belief that adult establishments produce undesirable secondary effects such as neighborhood deterioration, crime and decreased property values. Justice Diamond found that, in enacting the Amended Zoning Resolution, the City reasonably relied on a number of studies undertaken in New York City and elsewhere concerning the secondary effects of adult establishments. She also found that the Amended Zoning Resolution is no broader than is necessary to address the negative effects associated with adult establishments.

Finally, Justice Diamond found that the Amended Zoning Resolution provides ample space for adult establishments, leaving almost 4% of New York City's total land area available for use by such establishments. She stated that defendants had "more than sufficiently demonstrated that the permissible areas are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate. While Plaintiffs have labored mightily to create issues of fact, none

exist." *Id.* at 814. This conclusion was based in part on the specific analysis provided in the affidavit of William Bernstein, First Deputy Executive Director of the Department of City Planning, and other affidavits submitted by the defendants, who represented that approximately 500 potential relocation sites existed in New York City. She also considered McLaughlin's affidavit, which concluded that the actual number of available alternative sites was much smaller than the 500 or so claimed by the defendants. Justice Diamond found that McLaughlin's methodology was "fatally flawed" because it unjustifiably eliminated a number of sites based on factors that McLaughlin claimed make certain sites unavailable. *Id.* at 812. These factors included the undeveloped state of the proposed site, suitability for some "generic commercial enterprise," presence of a long-term lessee, current use as a parking lot and lease clauses prohibiting adult uses. Noting that such factors have been repeatedly rejected by state and federal courts, Justice Diamond found that McLaughlin and plaintiffs failed to rebut defendants' evidence that ample sites were available for the relocation of adult establishments. In so doing, she stated:

> Although 10 months have passed since McLaughlin states he obtained zoning maps maintained by the DCP, he claims that he cannot estimate the acreage size of the permissible zones because of lack of time. He also fails to offer his own number of potential relocation sites under either the City's methodology or his own methodology to rebut the City's calculation.

Id. Justice Diamond rejected plaintiffs' contention that the defendants' estimate of 500 sites was invalid because it

was generated by computer and not by inspection of the actual sites. She determined from the deposition testimony of Marilyn Mammano that the defendants' computation of alternative sites was properly calculated, based on conservative measurements, and, while not "site specific," was an acceptable estimate of the potential number of sites in the permissible areas. *Id.* at 812-813.

Finally, Justice Diamond rejected plaintiffs' request for additional discovery, because the administrative record before the court was "thorough, extensive and comprehensive." *Id.* at 813.

The decision of the New York County Supreme Court was unanimously affirmed by both the Appellate Division, 663 N.Y.S.2d 812 (1st Dep't 1997), and the New York Court of Appeals, 1998 WL 77749 (February 24, 1998). Holding that the state constitutional standards governing regulations such as the Amended Zoning Resolution are substantially the same as the federal standards, the Court of Appeals relied on both state and federal authority to hold that the Amended Zoning Resolution had a purpose unrelated to speech, imposed restrictions no broader than necessary to implement the legitimate concerns of the legislature, and provided for reasonable alternative avenues of communication. Thus, after a thorough review of the record below, the Court of Appeals held that the resolution did not violate the state constitution and could be enforced by defendants. ___ N.Y.S.2d at ___, 1998 WL 77749, at *12.

On February 26, 1998, plaintiffs returned to this Court seeking a temporary restraining order and a preliminary injunction against the enforcement of the Amended Zoning Resolution.

DISCUSSION

Defendants contend that the doctrine of collateral estoppel precludes plaintiffs from relitigating in this Court the same factual issues that have already been tried and decided in the state court. The preclusive effect of a state court determination in a subsequent federal proceeding is governed by the rules of the state in which the prior action was tried. 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Sokol v. New York*, 113 F.3d 303, 306 (2d Cir. 1997). Under New York law, a factual issue determined in a prior litigation is given preclusive effect if the issue to be precluded was necessarily decided in the prior litigation and the party opposing preclusion had a full and fair opportunity to litigate the issue. *Ryan v. New York Tel, Co.*, 478 N.Y.S.2d 823, 826 (N.Y. Ct. App. 1984); *Sokol*, 113 F.3d at 306. Collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy by preventing needless litigation" *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Where factual determinations by a state court are at issue, collateral estoppel also "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96.

The First Amendment standard applicable to a content-neutral zoning ordinance regulating the location of

adult entertainment businesses was established by the Supreme Court of the United States in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1985). Under *Renton*, zoning ordinances of the kind at issue in these actions are content neutral time, place, and manner regulations if the legislative purpose is other than the restriction of speech. According to *Renton*, such a content-neutral ordinance is permissible if it is "designed to serve a substantial governmental interest" and "allows for reasonable alternative avenues of communication." *Id.* at 50.

Each of the inquiries set out by the Supreme Court in *Renton* – the legislative purpose, whether the ordinance is designed to advance a substantial government interest, and the availability of reasonable alternative avenues of communication – is a factual issue that has been litigated by plaintiffs and decided by the Supreme Court for New York County and affirmed by both the Appellate Division and the New York Court of Appeals. After extensive submissions by the parties, Justice Diamond held that (1) the City acted in response to concerns regarding the secondary effects of adult establishments; (2) the City reasonably relied on a number of studies to conclude that adult businesses produce adverse secondary effects; (3) the Amended Zoning Resolution is "no broader than necessary" to prevent those adverse effects; and (4) defendants had "more than sufficiently demonstrated that the permissible areas" for adult establishments remaining in the City "are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate." 653 N.Y.S.2d at 803, 808, 809, 814.

Each of those inquiries was necessarily decided in the state court proceedings, and plaintiffs had a full and fair opportunity to litigate the issues in the state courts. Accordingly, if the doctrine applies, those issues are precluded from further litigation in this Court under the doctrine of collateral estoppel, now known as issue preclusion.

Plaintiffs offer no persuasive reason to be permitted to relitigate in this Court the very same issues they litigated in the state courts in order to persuade this Court to reach a different factual result. Plaintiffs contend that under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), they reserved their rights to relitigate these issues in federal court. The *England* case preserves a plaintiff's right to relitigate in federal court all issues related to the federal issues when the federal court is plaintiff's chosen forum, and plaintiff is forced, over its objection, to litigate those issues in state court because a federal judge sua sponte decides to abstain under *Pullman*. Here, however, plaintiffs' chosen forum was emphatically the state court. After plaintiffs filed these actions in state court, defendants removed them to this Court. Plaintiffs promptly moved to remand all their claims to the state court, and fought vigorously to return to their chosen forum, the state court. *England* does not govern or prohibit issue preclusion in these actions.

Plaintiffs also contend that they did not get a full and fair opportunity to litigate in state court. Under the New York law of issue preclusion, the party seeking preclusion has the burden of demonstrating the identity of the issues and that the issues were actually and necessarily decided in the prior litigation. The party opposing collateral

estoppel has the burden of establishing the absence of a full and fair opportunity to litigate the issues in the prior action. *Sokol*, 113 F.3d at 306. A determination of whether a full and fair opportunity to litigate was provided requires consideration of the "realities" of the prior litigation. The factors to be considered include: (1) the nature of the forum and the importance of the claim in the prior litigation; (2) the incentive to litigate and the actual extent of litigation; (3) the competence and experience of counsel; and (4) the foreseeability of future litigation. *Ryan*, 478 N.Y.S.2d at 827.

Plaintiffs complain that the actions were decided on summary judgment and after inadequate opportunity for discovery. Plaintiffs contend that their expert was not given adequate time to prepare his analysis of the purported alternative sites. Plaintiffs also argue that they were denied access to "critical information" such as how maps of permissible relocation areas were generated by the City. Finally, plaintiffs argue that they were not permitted to file a surreply after the City introduced new evidence and arguments on reply relating to the availability and suitability of potential sites.

The mere fact that a case is resolved on summary judgment and does not proceed to trial does not deny a party a full and fair opportunity to litigate. *See, e.g., Tobias v. First City National Bank and Trust Co.*, 709 F. Supp. 1266, 1270-1271 (S.D.N.Y. 1989). Moreover, the "full and fair opportunity" requirement does not entitle a party to unlimited discovery. Indeed, state court proceedings permitting no discovery at all can be entitled to preclusive effect in federal court. *McBride v. Bratton*, 1996 WL 636075, at *3 (S.D.N.Y. November 4, 1996), *aff'd*, 122 F.3d

1056 (2d Cir. 1997). It is undisputed that plaintiffs viewed the New York courts as the main forum and the New York Constitution as the principal basis for their extremely important effort to prevent New York City from requiring them to close and move their businesses. Plaintiffs were represented by experienced and highly competent counsel. They were permitted some discovery, and had a full opportunity to press any procedural grievances in addition to their substantive claims in the state courts.

Plaintiffs were permitted to take the deposition of Marilyn Mammano, designated by defendants as the staff person familiar with the calculation made by defendants with respect to available alternative sites. Plaintiffs complain that Ms. Mammano was repeatedly directed not to answer questions, including questions related to the methodology of calculating the number of alternative sites and the suitability of alternative sites. Plaintiffs also complain that their requests for documents on these topics – those reviewed by Ms. Mammano before the deposition, and other documents – were denied. On the other hand, plaintiffs themselves point to a great deal of information from the Mammano deposition that they used to support their position in the state court, including testimony relating to the degree of defendant's investigation of alternative sites.

The New York courts themselves addressed plaintiffs' demands for discovery. Justice Diamond noted that plaintiffs' expert had had zoning maps for 10 months before he made his submission in opposition to defendants' motion for summary judgment, and that with those maps, he could have estimated the acreage size of

the permissible zones. Nevertheless, he failed to calculate the number of potential relocation sites under his methodology. She also expressly addressed plaintiffs' claim that additional discovery was needed, "in view of the present administrative record that this court finds to be thorough, extensive and comprehensive." 653 N.Y.S.2d at 813. Moreover, the New York Court of Appeals noted that before issuing a decision, the New York County Supreme Court ordered defendants to respond to interrogatories served by the Hickerson plaintiffs, to provide maps of alternative sites that eliminated encumbered areas, and to produce Ms. Mammano for deposition. The record before Justice Diamond totaled more than 10,000 pages, including pleadings, affidavits, exhibits and briefs. ___ N.Y.S.2d at ___, 1998 WL 77749, at *4.

In sum, plaintiffs have not shown that they did not have a full and fair opportunity to litigate ably and vigorously in the state courts the very factual issues that are dispositive of their claim under the First Amendment. Accordingly, the factual findings of the New York County Supreme Court as affirmed by the Appellate Division and the Court of Appeals are entitled to preclusive effect.

It should be noted that the zoning resolution attacked in this case under the First Amendment is before the Second Circuit in the case of *Buzzetti v. City of New York*, 1997 WL 164284 (S.D.N.Y. April 8, 1997). That case has been argued before the Second Circuit and is pending decision in that court.

This order denying a preliminary injunction is stayed until the close of court business on Monday, March 9,

1998 so that plaintiffs can promptly seek from the Second Circuit a stay pending appeal.

SO ORDERED.

Dated: New York, New York
March 6, 1998

/s/ Miriam Goldman Cedarbaum
MIRIAM GOLDMAN
CEDARBAUM
United States District Judge

APPENDIX C

91 N.Y.2d 382

STRINGFELLOW'S OF NEW YORK, LTD., Appellant,

v.

CITY OF NEW YORK et al., Respondents,

Times Square Business Improvement District et al., Intervenors-Respondents.

AMSTERDAM VIDEO INC. et al., Appellants,

v.

CITY OF NEW YORK et al., Respondents,

and

Times Square Business Improvement District et al., Intervenors-Respondents.

Rachel HICKERSON et al., Appellants,

v.

CITY OF NEW YORK et al., Respondents,

and

Times Square Business Improvement District et al., Intervenors-Respondents.

Court of Appeals of New York.

Feb. 24, 1998.

Mark J. Alonso, P.C., New York City (Mark J. Alonso and Anna E. Bornstein, of counsel), for appellant in the first above-entitled action.

Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, New York City (Herald Price Fahringer and Erica T.

Dubno, of counsel), for appellants in the second above-entitled action.

Arthur Eisenberg, Norman Siegel and Beth Haroules, New York City, for appellants in the third above-entitled action.

Jeffrey D. Friedlander, Acting Corporation Counsel of New York City (Leonard Koerner, Albert G. Fredericks and Elizabeth S. Natrella, New York City, of counsel), for respondents in the first, second and third above-entitled actions.

Cravath, Swaine & Moore, New York City (Frederick A.O. Schwarz, Jr. and Justin J. Daniels, of counsel), for Times Square Business Improvement District, intervenor-respondent in the first, second and third above-entitled actions.

Dewey Ballantine, L.L.P., New York City (Wayne A. Cross and Heather K. McDevitt, of counsel), Dennis J. Saffran and Brian M. Stettin, for Center for the Community Interest and others, intervenors-respondents in the first, second and third above-entitled actions.

Morrison & Foerster, L.L.P., New York City (Michelle N. Kim, of counsel), for Association of the Bar of the City of New York, amicus curiae in the first, second and third above-entitled actions.

Zane and Rudofsky, New York City (Edward S. Rudofsky, Martin P. Mehler, Charles F. Axelrod and Arlene H. Schechter, of counsel), for Council of Regulated Adult Liquor Licensees, amicus curiae in the second above-entitled action.

Berkman, Gordon, Murray & De Van, Cleveland, OH (J. Michael Murray, of the Ohio Bar, admitted pro hac vice, of counsel), for First Amendment Lawyers Association, amicus curiae in the second and third above-entitled actions.

OPINION OF THE COURT

TITONE, Judge.

This appeal concerns the validity of New York City's Amended Zoning Resolution governing the location of adult entertainment establishments throughout the five boroughs. We conclude that on this record the Supreme Court correctly granted summary judgment declaring that the challenged ordinance does not violate plaintiffs' constitutional rights of free expression.

I. Factual Background

The "adult" establishments at the center of this controversy offer various forms of sexual expression. These businesses include bookstores, theaters, stores dealing in videotaped material and places of live entertainment. In 1965, there were only nine such establishments in New York City. That figure has fluctuated over the past 30 years, but the last decade has experienced a steady growth in the industry, with sections of Manhattan and Queens showing the greatest development. By 1993, there were 177 adult establishments operating in New York City: 107 in Manhattan, 44 in Queens, 15 in Brooklyn, eight in the Bronx and three in Staten Island.

In September of 1993, the Department of City Planning (DCP) undertook an evaluation of the impact of such property uses on urban life. Published in September 1994, the DCP study was divided into two parts. First, the DCP examined similar studies conducted in nine other localities: Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California; Austin, Texas; Phoenix, Arizona; Manatee County, Florida; New Hanover County, North Carolina; and the State of Minnesota. The DCP found evidence in these reports that adult businesses often have such negative secondary impacts as increased crime rates, depreciated property values and deteriorated community character.

The DCP also sought to identify the specific adverse secondary effects caused by adult establishments in New York City itself. To accomplish that goal, the DCP both conducted its own independent analysis of six selected areas in the City and examined other earlier studies of the City's adult uses. Among the other materials examined were a 1977 report by the City Planning Commission (CPC); a 1983 Annual Report of the Mayor's Office of Midtown Enforcement; a 1993 study conducted by the Chelsea Action Coalition and Manhattan Community Board 4; testimony at an October 1993 public hearing before the Task Force on the Regulation of Sex-Related Businesses; an April 1994 Times Square Business Improvement District (TSBID) study; and a 1993 survey compiling media accounts and complaint correspondence to City agencies.

The DCP's independent study confirmed that the number of adult establishments in the City had increased considerably in recent years. The DCP further found that

as adult uses proliferated, they tended to cluster. In Manhattan, for example, adult businesses were concentrated in central locations such as the Times Square area. In the other boroughs, such businesses lined major vehicular routes such as Queens Boulevard in Queens and Third Avenue in Brooklyn. Additionally, the vast majority of adult establishments were located in zoning districts that permitted residential development.

Based on the material before it, the DCP determined that there were significant adverse impacts attributable to adult enterprises in the City, including downward pressure on property values and increased crime rate in areas where adult uses are most concentrated. A pivotal finding of the DCP was that a large majority of surveyed business and community organizations believe that their neighborhoods are adversely affected by the presence of adult uses and that this perception itself leads to disinvestment and a marked decline in economic and pedestrian activity.

II. The Challenged Ordinance

The Zoning Resolution of the City of New York, adopted on December 15, 1960, regulates commercial establishments in the City. Historically, the Resolution did not distinguish between adult establishments and other commercial ventures. Like other businesses, adult enterprises simply had to satisfy the requirements for the particular "use group" into which they were classified. Consequently, adult uses were permitted in most of the

City's commercial and manufacturing districts, which frequently also allowed residential development or were mapped close to residential districts.

Prompted by the findings and final recommendation of the DCP study that adult establishments should be regulated differently from other commercial establishments because of their unique negative effects, the CPC directed the DCP in November of 1994 to draft a set of adult-use zoning restrictions. Concomitantly, the City Council imposed a one-year moratorium on the creation or enlargement of adult-use establishments.

On March 21, 1995, the DCP and the City Council Land Use Committee jointly sought to amend the Zoning Resolution and establish a permanent and comprehensive set of regulations governing adult uses. Over the next several months, the City's 59 community boards, five borough boards and borough presidents, the CPC and the City Council reviewed the proposed amendments and conducted public hearings. On September 18, 1995, the CPC approved the proposed amendments, noting that they were "an appropriate and necessary response to the adverse secondary effects stemming from adult establishments" and that they nonetheless continue "to provide ample opportunity for adult establishments to locate and operate throughout New York City." After further public hearings and debate, the City Council gave final approval to Text Amendment N 950384 ZRY on October 25, 1995.

As adopted by the City Council, the amendments are applicable to any "adult establishment," defined as those commercial enterprises in which a "substantial portion" of the premises are used as an "adult book store," an

"adult eating or drinking establishment," an "adult theater" or "other adult commercial establishment" (Amended Zoning Resolution § 12-10). Covered facilities are those within the foregoing four categories that "regularly feature" or devote a "substantial portion" of their stock-in-trade to entertainment or material that is "characterized by an emphasis on" "specified anatomical areas" or "specified sexual activities" (*id.*). "Adult eating or drinking establishments," "adult theaters" and "other adult commercial establishments" are covered only if they exclude minors because of their age (*id.*).

The amendments to the zoning code include an array of site limitations and anticlustering provisions. Under provisions that predate the amendments, new commercial establishments, including new adult establishments, are barred from the City's residential zones. Under the amendments, adult establishments, new and old, are now also barred from certain districts that are zoned for manufacturing and commercial use but also permit residential development. The regulated uses are permitted in all other manufacturing districts and in all high-density, general commercial districts (Amended Zoning Resolution § 32-01[a]; § 42-01[a]).

Within those districts where adult uses are authorized, the adult establishment must be located at least 500 feet from schools, houses of worship, day care centers, other adult uses and zoning districts where new residential development is allowed (Amended Zoning Resolution § 32-01[b]; § 42-01[b]). In addition, no more than one adult establishment may be located on a single zoning lot, and these establishments cannot exceed 10,000 square

feet of usable floor area and cellar space (Amended Zoning Resolution § 32-01[d], [e]; § 42-01[d], [e]). The amendments also impose restraints on the size, placement and illumination of accessory business signs (Amended Zoning Resolution §§ 32-69, 42-55).

Any adult establishment operating in a prohibited location must either conform or terminate its business within one year of the amendments' effective date (Amended Zoning Resolution §§ 52-77, 52-734). An exception to this termination requirement is available for existing businesses which are noncompliant only because (1) their area exceeds 10,000 square feet, (2) they are located on a zoning lot with another adult use, or (3) they are situated less than 500 feet from another adult establishment (Amended Zoning Resolution § 32-01[f]; § 42-01[f]). Another narrow exception is made for otherwise conforming adult uses that fall out of compliance because of the subsequent siting of a school or house of worship within 500 feet of their boundaries (Amended Zoning Resolution § 32-01[b]; § 42-01[b]). Lastly, adult establishments faced with the one-year termination deadline can apply for an extension to the Board of Standards and Appeals, which may permit the applicant to remain open for a limited time to amortize any substantial and unrecovered costs associated with the adult portion of the establishment (Amended Zoning Resolution § 72-40).

III. Procedural History

On February 27, 1996, the *Amsterdam Video* plaintiffs, consisting of more than 100 owners and operators of

adult establishments in the City, and the *Hickerson* plaintiffs, consisting of four patrons of such establishments, commenced actions in Supreme Court, New York County, against the City and related officials. Plaintiffs alleged that the Amended Zoning Resolution deprived them of their right to free expression protected by article I, § 8 of the New York State Constitution and the First Amendment to the United States Constitution. Plaintiffs sought relief in the form of a judgment declaring the zoning amendments unconstitutional and enjoining their enforcement.

Defendants removed the case to the United States District Court for the Southern District of New York, but on plaintiffs' application the court remanded plaintiffs' causes of action grounded in the State Constitution, retaining jurisdiction over the Federal claims (932 F.Supp. 550). Subsequently, Stringfellow's, a cabaret featuring topless dancers, separately challenged the constitutionality of the amendments and sought injunctive relief. Supreme Court then granted the intervention motions of TSBID, the Center for Community Interest, and 45 other community groups, business organizations and local elected officials and consolidated the actions for hearing.

On August 26, 1996, defendants moved for summary judgment. The *Amsterdam Video* and *Stringfellow's* plaintiffs cross-moved for summary judgment; the *Hickerson* plaintiffs opposed defendants' motions but declined to cross-move for summary judgment on the theory that the case involved material factual disputes warranting a trial. Before issuing its decision, Supreme Court ordered additional discovery, in particular directing defendants to answer interrogatories served by the *Hickerson* plaintiffs,

to provide maps to demonstrate the areas where adult uses would be permitted when encumbered areas were eliminated, and to produce for a deposition a person familiar with the DCP's calculation of the total number of alternative sites that would be available to relocated adult establishments under the amendments. A voluminous record of pleadings, affidavits, exhibits and briefs totaling more than 10,000 pages was before the court on the various summary judgment motions.

On October 23, 1996, Supreme Court granted defendants' motions for summary judgment and declared that "the Amended Zoning Resolution does not violate plaintiffs' rights of freedom of expression guaranteed under the State Constitution, and is, therefore, constitutional" (171 Misc.2d 376, 397, 653 N.Y.S.2d 801). Applying the test articulated by this Court in *Matter of Town of Islip v. Caviglia*, 73 N.Y.2d 544, 558-559, 542 N.Y.S.2d 139, 540 N.E.2d 215, Supreme Court first concluded that the amendments were content neutral. The court found in the City's planning studies sufficient evidence of adverse secondary effects to support use of its zoning authority to address a serious neighborhood problem. Additionally, the court held that the amendments were no broader than necessary to achieve their stated purpose, with zoning being the most appropriate response to address existing and anticipated future problems. Further, in the court's view, defendants had sufficiently demonstrated that the number of potential relocation sites under the Amended Zoning Resolution was more than adequate to accommodate the existing number of businesses. Plaintiffs' claim of a lack of available alternative sites, in contrast, was speculative and rested on discredited theories. Thus, the

court concluded, no issues of material fact existed requiring a trial. The Appellate Division unanimously affirmed (241 A.D.2d 360, 663 N.Y.S.2d 812) and plaintiffs took an appeal as of right pursuant to CPLR 5601(b)(1).[1]

IV. Analysis

This Court has long recognized the considerable authority of municipalities to implement zoning plans and programs to meet the increasing encroachments of urbanization on the quality of their residents' lives (*see, e.g., Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265; *Matter of Harbison v. City of Buffalo*, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42). Because they are legislative enactments, these land-use regulations generally enjoy a strong presumption of constitutionality as valid exercises of the State's police power to advance the public health, safety and welfare (*see, McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 548-549, 498 N.Y.S.2d 128, 488 N.E.2d 1240; *Udell v. Haas*, 21 N.Y.2d 463, 469-470, 288 N.Y.S.2d 888, 235 N.E.2d 897). Thus, even if the validity of a provision is "fairly debatable," the municipality's judgment as to its necessity must control (*Matter of Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 186, 351 N.Y.S.2d 129, 306 N.E.2d 155).

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[1] Enforcement of the Amended Zoning Resolution was stayed pursuant to an Appellate Division order dated October 24, 1996 and a subsequent agreement among the parties. On September 23, 1997, this Court denied defendants' request for a vacatur of the stay (90 N.Y.2d 933, 664 N.Y.S.2d 266, 686 N.E.2d 1362).

Municipal zoning authority is not, however, completely unfettered. Ordinances such as the one challenged here that aim to curb "adult" uses implicate speech or conduct that is protected by the First Amendment (*see, e.g., Schad v. Mount Ephraim*, 452 U.S. 61, 65, 101 S.Ct. 2176, 2180-2181, 68 L.Ed.2d 671; *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-2615, 37 L.Ed.2d 419; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503, 72 S.Ct. 777, 780-781, 96 L.Ed. 1098) and by article I, § 8 of the New York State Constitution.[2] Consequently, in weighing the validity of such zoning regulations, courts must consider the intertwined constitutional values of free expression.

In this State, the proper balance between community needs and free expression under our Constitution has been delineated in *Matter of Town of Islip v. Caviglia*, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215, *supra*. At issue in Islip was a zoning ordinance that confined adult uses to industrially zoned areas and prohibited them from locating within 500 feet of a number of certain sensitive receptors or within one-half mile of each other. The ordinance had been prompted by studies of conditions locally and elsewhere which demonstrated the harmful impact of adult businesses on the surrounding community. We concluded that the ordinance satisfied both Federal constitutional standards (*see, Renton v. Playtime Theatres*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29)

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[2] Article I, § 8 provides in relevant part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

and the distinct protections afforded by our State Constitution. In so ruling, the Court considered whether the "predominant purpose" of the challenged ordinance was to ameliorate the negative secondary effects of adult uses rather than to suppress their content, whether the ordinance was "narrowly tailored to affect only those uses shown to produce the unwanted secondary effects" and whether it provided adequate alternative locations for adult businesses within the Town (73 N.Y.2d, at 552-555, 542 N.Y.S.2d 139, 540 N.E.2d 215, citing *Renton v. Playtime Theatres*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, *supra; Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310). With respect to the State constitutional claims in *Islip*, the Court considered whether the Town's ordinance was "justified by concerns unrelated to speech," whether it was " 'no broader than needed to achieve its purpose' " under the State constitutional principles set forth in *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492, and, finally, whether "if the ordinance [were] enforced the total number of adult bookstores w[ould] decline or * * * fewer potential customers w[ould] be able to conveniently patronize them" (73 N.Y.2d, at 557-560, 542 N.Y.S.2d 139, 540 N.E.2d 215). It is against the template of *Islip*, that we measure plaintiffs' claims in these cases.

A. The Ordinance's Purpose Is Unrelated to Speech

The threshold issue here is whether the City's zoning amendments are purposefully directed at controlling the

content of the message conveyed through adult businesses or are instead aimed at an entirely separate societal goal. The Federal constitutional analysis requires examination of the ordinance's "predominant purpose" (*see, Renton v. Playtime Theatres, supra*), while the State constitutional inquiry focuses on whether there has been "a purposeful attempt to regulate speech" (*Matter of Town of Islip v. Caviglia, supra,* at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215). In the context of these facts, however, the difference in verbiage does not significantly affect the outcome, since it is apparent from the amendments' legislative history that ameliorating the negative social consequences of proliferating adult uses was the City's *only* goal.

Before enacting the Resolution, the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City. One of these studies, prepared by the TSBID, focused on the impact of adult uses on property values and the incidence of crime in the Times Square area, in the heart of Manhattan. The TSBID identified four study blocks (those containing at least one adult enterprise) and four neighboring control blocks (those with no sex-related establishments), and then compared those data with similar statistics for the District as a whole, the wider Times Square area, all of Manhattan, and all of New York City. The data included crime statistics, property valuations and 53 formal interviews with business and real estate enterprises.

The study concluded that "the rate of increase of the total actual assessed values of the Eighth Avenue Study Blocks was less than the rate of increase for the Control Blocks along Ninth Avenue. To a lesser extent, the rate of increase of the actual total assessed value of the 42nd Street Study Block is less than that of the 42nd Street Control Block." It also determined that "[w]ithin the study blocks, non-adult businesses with adult establishments nearby showed a deflated rate of property value growth, compared to the adult establishments themselves which increased in value at a higher rate." Similarly, the underlying data showed a correlation between a concentration of adult establishments and increased crime. Over the five years preceding the study, for example, police statistics showed that there was an estimated 54% decrease in crime in the Times Square area, a decrease which was paralleled by a decrease in adult establishments. The study also found significant "patterns," notably that there were many more criminal complaints on the study blocks than the control blocks and that the heaviest incidence of prostitution arrests occurred in the three block study area of dense concentration of adult establishments.

The Chelsea Action Coalition and Manhattan Community Board 4 prepared a second study of the effects that sex-related businesses have on other businesses in the Chelsea section of Manhattan. The study incorporated a survey of 100 Chelsea businesses located near triple-X video stores and peep shows in the neighborhood. A majority of those surveyed indicated that adult uses had a negative impact on their businesses and on the economic viability of the community as a whole.

The DCP independently surveyed six study and control areas – two in Manhattan, and one in each of the remaining boroughs. More than 80% of the real estate brokers responding to the survey reported that an adult establishment tends to depress the market value of property within 500 feet; similarly, community organizations overwhelmingly reported their perceptions that adult businesses negatively affect the community. Although the DCP acknowledged that its analysis of the hard data regarding the relationship between adult uses and urban ills did not yield conclusive results, a reading of its report as a whole indicates that the negative perception of adult enterprises held by the business community and the public itself results in disinvestment, with the concomitant deterioration in the social and economic well-being of the surrounding area.

Finally, the City additionally reviewed conclusions reached by city councils and town boards throughout the country. A 1984 study conducted for the City of Indianapolis, for example, found higher crime rates in areas containing at least one adult establishment than in similar areas without adult uses. The Indianapolis study included a nationwide survey of real estate appraisers. A large majority of the appraisers indicated that, in their professional opinions, an adult bookstore would have a negative effect on the value of both residential and commercial properties located within a one block radius of the store. Still another example was a 1997 Los Angeles study that included a survey of real estate professionals and businesses. The survey indicated that a concentration of adult establishments adversely affected the value of surrounding commercial and residential property, made

it more difficult to rent office space and retain commercial tenants in the area, and made it harder for area businesses to attract and retain customers.

In view of the legislative record upon which the City Council rested its decision to regulate adult uses, we agree with the courts below that enactment of the Amended Zoning Resolution was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose (*see, Matter of Town of Islip v. Caviglia, supra*). Plaintiffs' reliance on isolated comments from several City Council members and other City officials as evidence of an alleged improper motive to eradicate this form of expression is unavailing. A similar claim was rejected in *Islip*, where we recognized that courts will not "invalidate a municipal zoning ordinance simply because one or more legislators sought to suppress protected expression * * * . [I]t is the motive of the Legislature, not individual legislators, that is controlling" (*id.*, at 552, n. 2, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Nor is it significant that definitions of adult uses in the Amended Zoning Resolution are based in part on the content of the entertainment offered rather than exclusively on the age of the businesses' clientele (*cf., Matter of Town of Islip v. Caviglia, supra*, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215). The test under both *Islip* and *Renton* is not whether the regulated establishments are defined without reference to content but whether the ordinance's goal is unrelated to suppressing that content (73 N.Y.2d, at 557, 542 N.Y.S.2d 139, 540 N.E.2d 215, 475 U.S. at 44, 47-50, 106 S.Ct. at 927, 928-930; *see also, Young v. American Mini*

Theatres, supra, at 52-54, 70-71, 96 S.Ct. at 2443-2445, 2452-2453 [plurality opn]). That test is plainly met here.

Plaintiffs' complaints about the sufficiency of the evidence on which the City Council based its decision are unpersuasive. In *Islip,* we explicitly acknowledged the value of studies from other jurisdictions (73 N.Y.2d, at 550, 553, 542 N.Y.S.2d 139, 540 N.E.2d 215). Further, it is clear from the comments of the CPC upon its approval of the amendments that the appropriate municipal officials considered the comparability and the reliability of the other jurisdictions' studies and found them satisfactory on both counts. As the CPC noted, "while none of the other studies considers a municipality which duplicates New York City in terms of variety of neighborhoods and built conditions, * * * the findings of adverse secondary effects and the conditions found in these other studies are relevant to the different neighborhoods of New York City." Plaintiffs have not offered any factual or legal basis to question that finding.

Moreover, the City did not rely exclusively on generic conclusions drawn from out-of-area studies but also conducted studies of its own. Contrary to plaintiffs' contentions, the "nonempirical," anecdotal evidence that comprised the bulk of the local studies does not render those studies worthless. In the proper context, anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects (*see, e.g., Renton v. Playtime Theatres,* 475 U.S., at 44, 106 S.Ct. at 927, *supra; ILQ Invs. v. City of Rochester,* 25 F.3d 1413, 1416-1417 [8th Cir.], *cert. denied* 513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d

493), particularly where, as here, the nonempirical information is extensive and indicative of a clear relationship between adult uses and urban decay.

B. The Amendments Are No Broader Than Necessary

Based upon an extensive analysis of the impacts of such establishments in the City, the amendments represent a coherent regulatory scheme designed to attack the problems associated with adult establishments. By preventing adult businesses from locating in potential residential districts while allowing such establishments to locate in manufacturing and commercial districts, the amendments protect only those communities and community institutions that are most vulnerable to their adverse impacts.

It is now well recognized that municipalities can constitutionally bar adult establishments from, or within, a specified distance of residentially zoned areas and facilities in which families and children congregate (*see, Renton v. Playtime Theatres, supra,* at 44, 106 S.Ct. at 927; *Young v. American Mini Theatres, supra,* at 52, 96 S.Ct. at 2443-2444; *Matter of Town of Islip v. Caviglia, supra,* at 549, 563, 542 N.Y.S.2d 139, 540 N.E.2d 215). Moreover, zoning ordinances may be used to prohibit an adult business from operating within a specified distance of another in order to avoid the undesirable impacts associated with the clustering (*see, Young v. American Mini Theatres, supra,* at 52, 96 S.Ct. at 2443-2444; *Matter of Town of Islip v. Caviglia, supra,* at 563, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Relying on our State constitutional standard (*see, People ex rel. Arcara v. Cloud Books, supra,* at 558, 510 N.Y.S.2d 844, 503 N.E.2d 492), plaintiffs insist that defendants should have pursued less restrictive methods of addressing the problems caused by adult uses, such as more aggressive enforcement of existing penal and public nuisance laws, developing targeted signage requirements and limiting adult-use zoning restrictions to new establishments. However, the record here shows that the City Council reasonably determined that the listed alternatives would not adequately address problems it sought to ameliorate.

According to its report approving the proposed amendments, the CPC concluded that restricting only new adult uses "would have the effect of freezing certain locations and certain neighborhoods as the situs of adult establishments," making the reversal of existing adult-use-related blight impossible. The CPC also looked at the possibility of sign regulations, but found, based on the studies before it, that such a narrow approach would not suffice to address such ills as reduced property values, economic stagnation, heightened crime and change in neighborhood character. As to the efficacy of more aggressive law enforcement measures, the CPC hearings revealed that such measures are generally only partially successful in stemming the criminal activity that often surrounds adult establishments.

Contrary to plaintiff's assertions in *Stringfellow's,* the City was not obligated on this record to distinguish among different types of adult uses based on the social class of their clientele or the nature of the adult entertainment they provide. Indeed, such distinctions may well

have themselves run afoul of constitutional prohibitions (*see, id.*, at 558, 510 N.Y.S.2d 844, 503 N.E.2d 492). Significantly, the CPC itself found that "all of the adult uses which would be covered by the proposed regulations have been shown to produce adverse secondary effects * * * . Nothing in the studies or in the public testimony justifies distinctive treatment of any adult use." To the extent that certain individual establishments may legitimately claim that their facilities do not contribute to urban blight, their argument does not impair the constitutionality of the challenged legislation, since "[t]he validity of a statute * * * is not to be determined from its effect in a particular case, but upon its general purpose and its effect to that end" (*City of Rochester v. Gutberlett*, 211 N.Y. 309, 316, 105 N.E. 548; *see also, ILQ Invs. v. City of Rochester, supra*, at 1418).

C. Reasonable Alternative Avenues of Communication

To satisfy constitutional requirements, the City additionally must assure reasonable alternative avenues of communication (*see, Renton v. Playtime Theatres, supra*, at 53-54, 106 S.Ct. at 931-932). As this Court stated in *Islip*, there must be (1) "ample space available for adult uses after the rezoning" and (2) no showing by the challenger that enforcement of the ordinance will either substantially reduce the total number of adult outlets or significantly reduce the accessibility of those outlets to their potential patrons (73 N.Y.2d, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215).

Relying on a formula derived from *Renton v. Playtime Theatres (supra)*, the Federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses " 'in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads' " (*id.*, at 53, 106 S.Ct. at 932). Under *Renton*, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry (*see, Renton v. Playtime Theatres, supra*, at 53, 106 S.Ct. at 931-932; *Woodall v. City of El Paso*, 49 F.3d 1120, 1124-1125 (5th Cir. 1995), *cert. denied* 516 U.S. 988, 116 S.Ct. 516, 133 L.Ed.2d 425; *Grand Brittain v. City of Amarillo*, 27 F.3d 1068, 1070 (5th Cir.1994); *see also, Matter of Town of Islip v. Caviglia, supra*, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215 [areas of a municipality set aside for adult uses need not be prime locations]). Rather, the inquiry is limited to the *physical* and *legal* availability of alternative sites within the municipality's borders and whether those sites are part of an actual business real estate market (*see, Topanga Press v. City of Los Angeles*, 989 F.2d 1524, 1530-1531 (9th Cir.1993), *cert. denied* 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190; *see also, Woodall v. City of El Paso, supra; Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir.1991)).

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the

general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (*see*, 989 F.2d, at 1531). Notably, these considerations dovetail nicely with *Islip*'s requirement that there be "ample space available for adult uses after the rezoning" and no showing of a substantial reduction in the total number of adult outlets or the accessibility of those outlets to their potential patrons (73 N.Y.2d, at 555, 560, 542 N.Y.S.2d 139, 540 N.E.2d 215). With these considerations as a backdrop, we turn now to the specific facts and contentions presented here.

Plaintiffs assert, and the municipal defendants do not dispute, that the amendments' enforcement will lead to the forced relocation of some 84% of the City's 177 adult businesses. Given the extent of the dislocation, it is incumbent upon the municipal defendants to demonstrate that sufficient alternative receptor sites are available. The City has asserted that the space available for adult uses constitutes over 11% of the City's total land area and about 4% when reduced by land encumbered by properties that are unlikely to be developed for commercial use. They further assert, based on maps prepared by City officials, that the amended zoning code leaves at least 500 potential sites for adult establishments to relocate and operate.

According to the City's submissions, the amendments will allow adult businesses to remain in districts that permit a wide mix of commercial, retail, entertainment and manufacturing uses. All of the areas in Manhattan zoned for adult use and at least 80% of the land area in the other boroughs are within a 10-minute walk from a

subway line or a major bus route. These supported allegations by the City satisfy its initial burden of showing that the space designated for adult uses is adequate to accommodate the 177 existing adult businesses.

Plaintiffs, in challenging defendants' proof, rely heavily on an affidavit by Robert McLaughlin, a land-use planning and local government consultant who actually visited the sites the City identified as potential receptors. McLaughlin alleged that many of the sites are in truth unavailable because they currently house long-term occupants such as governmental and public utility facilities that are unlikely to yield to new tenants of any sort. Other sites, according to McLaughlin, lack the necessary infrastructure or lie on wetland property that is not suitable for commercial development. Overall, McLaughlin concluded, the City's zoning plan does not allow for adequate alternative avenues for adult expression.

The McLaughlin affidavit, however, is not sufficient to raise a triable question of fact as to the availability of enough potential receptor sites. First, the affidavit's utility is undercut by McLaughlin's reliance on several assumptions that are inconsistent with controlling legal principles. McLaughlin, for example, took the position that "industrial areas" are generally unsuitable for generic commercial uses. In *Islip*, however, this Court specifically approved a local zoning ordinance that restricted adult uses to an industrial zone (73 N.Y.2d, at 548, 555, 542 N.Y.S.2d 139, 540 N.E.2d 215; *accord, Renton v. Playtime Theatres, supra*, at 53, 106 S.Ct. at 931-932). Similarly, McLaughlin eliminated undeveloped land, waterfront property, warehouse areas and parking lots as unsuitable receptors, although both this Court and the

Renton Court expressly recognized such areas as potentially available relocation sites.

The most significant flaw in McLaughlin's affidavit, however, is the absence of any attempt to quantify his observations or to make concrete allegations as to precisely how many of the 500 potential receptor sites identified by defendants were, in his estimate, unavailable. To be sure, the affidavit lists a significant number of sites that are pragmatically unavailable because their current uses are so entrenched that they are unlikely to become part of the commercial real estate market in the foreseeable future. Included in this category are such diverse sites as those that house the northern half of Federal Plaza in Manhattan, the Clay Pit Ponds State Park Preserve in Staten Island, a New York City fire house in Brooklyn and a United Parcel Service facility in Queens. However, McLaughlin's criticisms about various individual sites do not provide an adequate counter to defendants' supported claim that within the available acreage as a whole there are more than enough receptor sites to accommodate the existing adult entertainment industry.

Even if the criticized sites are eliminated, the absence of any quantification in the McLaughlin affidavit makes it impossible to determine whether what remains of the 500 identified sites is insufficient to accommodate the 177 adult businesses that will have to relocate once the amendments are implemented. For example, despite McLaughlin's observations that several tracts within the nonresidential zone along the far west side of Manhattan are physically or pragmatically unavailable, his affidavit does not contain the hard factual data necessary to establish that, with the elimination of these sites and with due

consideration of the dispersal requirement, the City's claim that Manhattan will accommodate some 75 adult uses represents a significant overestimation. Given this shortfall, the accuracy of the City's over-all calculations was not called into serious question. Similarly, the McLaughlin affidavit did not provide a basis for inferring that the result of the new zoning controls would "restrict in any significant way those wishing to [patronize adult establishments]" (*Matter of Town of Islip v. Caviglia, supra,* at 554, 542 N.Y.S.2d 139, 540 N.E.2d 215). Thus, the McLaughlin affidavit is speculative and presents no impediment to summary judgment (*see, Romano v. Stanley,* 90 N.Y.2d 444, 451-452, 661 N.Y.S.2d 589, 684 N.E.2d 19).

D. Plaintiffs' Remaining Claims

The *Amsterdam Video* and *Stringfellow's* plaintiffs argue that the amendments' enforcement will lead to an unconstitutional taking because much of the substantial investments they have made in their businesses will be lost if they are required to relocate. They further contend that the one-year amortization provision in the ordinance (Zoning Resolution §§ 52-734, 52-77) is too short to give them an opportunity to recoup their investments. These arguments are unpersuasive, however, because they fail to take into account the effect of the statutory provisions for hardship extensions. Under these provisions, a non-conforming adult establishment may apply to the Board of Standards and Appeals for permission to continue to operate beyond the one-year amortization period set forth in the statute where it can show that it has made substantial expenditures related to the nonconformity, that such expenditures cannot be recouped within a year

and that the requested extension is the minimum necessary to permit such recoupment (Zoning Resolution § 72-40). Having failed to seek relief under this provision, plaintiffs are not now in a position to complain that their constitutional due process rights have been violated (*see, Matter of Parkview Assocs. v. City of New York*, 71 N.Y.2d 274, 525 N.Y.S.2d 176, 519 N.E.2d 1372, *cert. denied* 488 U.S. 801, 109 S.Ct. 30, 102 L.Ed.2d 9; *Town of Islip v. Zalak*, 165 A.D.2d 83, 95, 566 N.Y.S.2d 306).

Equally unavailing is plaintiff's contention that the amendments are unconstitutionally vague. As a threshold matter, the *Hickerson* plaintiffs, purportedly patrons of adult establishments, lack standing to assert these claims because the amendments do not directly regulate their conduct (*see generally, Matter of Axelrod v. Sobol*, 78 N.Y.2d 112, 115, 571 N.Y.S.2d 902, 575 N.E.2d 388). With respect to the *Amsterdam Video* and *Stringfellow's* plaintiffs' vagueness claims, it should suffice to observe that the amendments' definitional provisions are sufficiently specific to provide the public with clear and reasonable notice of the type of businesses that are covered. Indeed, the Federal courts have already upheld similar zoning provisions that regulate commercial facilities devoting a "substantial portion" of their businesses to adult entertainment (*see, e.g., ILQ Invs. v. City of Rochester*, 25 F.3d 1413 (8th Cir.1994), *cert. denied* 513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d 493, *supra*).

Finally, we are not persuaded by the *Stringfellow's* plaintiff's discrete argument that the ordinance's distance requirements are too vague because they do not include a statement indicating the precise standard for measurement. To the extent that this aspect of the ordinance's

provisions leaves room for confusion, the problem is procedurally remediable through administrative application and rule making. Notably, there is no indication on the present record that the City's enforcement of the distance rules will be arbitrary or uneven.

V. Conclusion

The City's effort to address the negative secondary effects of adult establishments is not constitutionally objectionable under any of the standards set forth by the United States Supreme Court in *Renton v. Playtime Theatres (supra)* or by this Court in *Matter of Town of Islip v. Caviglia (supra)*. Accordingly, in each case the order of the Appellate Division should be affirmed, with costs.

BELLACOSA, SMITH, LEVINE, CIPARICK and WESLEY, JJ., concur.

KAYE, C.J., took no part.

In each case: Order affirmed, with costs.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the **13th** day of July one thousand nine hundred and ninety-eight.

Amsterdam Video Inc., et al.,

Plaintiffs-Appellants,

v.

The City of New York, et al.,

Defendants-Appellees.

Dkt No: 98-7270

(Filed July 13, 1998)

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Plaintiffs-Appellants Amsterdam Video Inc., et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,

Administrative Attorney

p o ccc
inbancdn___frm

APPENDIX E

Amortization Ordinance

72-40

AMORTIZATION OF CERTAIN ADULT ESTABLISHMENTS AND SIGNS FOR ADULT ESTABLISHMENTS

The Board of Standards and Appeals may permit any non-conforming adult establishment or any non-conforming accessory business sign for an adult establishment to continue for a limited period of time beyond that provided for in Section 52-734 (Non-conforming accessory business signs for adult establishments) or Section 52-77 (Termination of Adult Establishments), provided that:

(a) an application is made by the owner of such establishment to the Board of Standards and Appeals at least 120 days prior to the date on which such establishment or sign must terminate;

(b) the Board shall find, in connection with such establishment or sign that:

(1) the applicant had made, prior to the non-conformity, substantial financial expenditures related to the non-conformity, and,

(2) the applicant has not recovered substantially all of the financial expenditures related to the non-conformity, and,

(3) the period for which such establishment or sign may be permitted to continue is the minimum period sufficient for the applicant to recover substantially all of the financial expenditures incurred related to the non-conformity.

For the purpose of this section, "financial expenditures" shall mean the capital outlay made by the applicant to

establish the adult establishment or sign exclusive of the fair market value of the building in which such use or sign is located and exclusive of any improvements unrelated to the non-conforming adult establishment or non-conforming accessory business sign for adult establishments.

Supreme Court, U.S.
FILED
DEC 16 1998
CLERK

(5)

No. 98-569

In the

Supreme Court of the United States

OCTOBER TERM, 1998

AMSTERDAM VIDEO INC., *et al.*,

Petitioners,

vs.

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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6 pp

The Respondents' arguments that Petitioners are estopped or precluded from obtaining a federal court determination of their First Amendment free speech claims (1) add importance to the Questions Presented, and (2) add to the appropriateness of granting certiorari.

* * *

The main Questions in this case stem from the Second Circuit's failure to recognize the jurisdictional effects of a *Pullman* abstention order. By resort to the doctrine of collateral estoppel, or issue preclusion, the Second Circuit (1) has effectively restored state court jurisdiction to decide a First Amendment free speech claim, a jurisdiction that the *Pullman* order had reserved to the federal courts, and (2) has effectively precluded any attempt by Petitioners to seek this Court's review of the important First Amendment issues at stake in this case. These are propositions of the highest First Amendment importance, fully justifying the grant of certiorari. And by ignoring the jurisdictional aspects of the *Pullman* order, the Second Circuit has created an urgent need for this Court's guidance in administering the *Pullman* abstention doctrine.

The responses of the Respondents to this jurisdictional misadventure only add fuel to the certiorari flames:

First: Respondents' main claim is that the state courts, in determining the issues of fact and law necessary to resolve the free speech claim under the state constitution, employed the same fact inquiry and used the same standards that would be dispositive of a First Amendment free speech claim. Thus, the argument goes, a federal court may then exercise its retained jurisdiction over the First Amendment by resort to the collateral estoppel doctrine embodied in the federal full faith and credit statute. But is that method of exercising retained federal jurisdiction consistent with the purpose and the meaning of a *Pullman* abstention order? And is the Second Circuit's review of the state court findings of fact

merely to determine whether issue preclusion should apply consistent with that court's "appellate . . . obligation to 'make an independent examination of the whole record' to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'"? *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984).

Second: Respondents press arguments that the state court proceedings respecting state constitutional issues preclude Petitioners from seeking or obtaining a federal court resolution of their First Amendment claim, even though the federal court had expressly retained jurisdiction to do just that. That proposition, if accepted, constitutes a significant and unprecedented event in the development of this Court's free speech jurisprudence. Respondents cite no First Amendment case, no First Amendment precedent, where a party has been precluded from seeking a federal court review of a First Amendment free speech claim, at least where the federal court has, or has retained, jurisdiction to do just that. If that is to be a part of First Amendment Law, this Court — not the Second Circuit — should so declare.

Third: While Respondents cite many precedents respecting the doctrines of collateral estoppel or issue preclusion, not one of them involve giving preclusive effect to a judgment by a court that had no jurisdiction over the matter at issue. Here, the state courts lacked any jurisdiction to decide the First Amendment claim. That jurisdiction had been specifically retained by the federal court in its *Pullman* abstention order. Here again, if that is to become a part of the federal law of issue preclusion, let it be declared by this Court, rather than by the silence of the Second Circuit.

Fourth: The Respondents assert that the "purported" *England* reservation that Petitioners filed in the state courts does not preclude application of the collateral estoppel doctrine. They argue that an *England* reservation is meaningful only where a party "invokes federal-court jurisdiction *in the first instance* on a federal claim," citing *Allen v. McCurry*, 449 U.S. 90, 101 n.17 (1980)(emphasis added). And since the Petitioners had originally filed both federal and state claims in a state court, only to have the entire case removed to federal court on Respondents' motion, the *England* reservation is said to be incapable of invoking federal jurisdiction to adjudicate the federal constitutional claims.

But the Petitioners ascribe no such jurisdictional qualities to their *England* reservation. The true jurisdiction dispensing event was the *Pullman* abstention order of the federal district court. That order specifically retained federal jurisdiction over the First Amendment claim, remanding to the state courts their jurisdiction over the state constitutional claims. Thus the *England* reservation was merely confirmatory of the earlier *Pullman* jurisdiction dispensing order. This Court should grant certiorari to clarify the jurisdictional aspects of the *Pullman-England* abstention doctrine.

Fifth: The Respondents make no effective response to the fact that Petitioners have been deprived of their right to seek certiorari review by this Court of their First Amendment free speech claims. The critical facts and analysis, we are told, took place in the state courts. And we are told that such First Amendment adjudication took the form of borrowing and using First Amendment standards in adjudicating free speech claims under the parallel free speech provisions of the New York state constitution. But since the state courts were only exercising jurisdiction over the state claims, consistent with the *Pullman* order, this Court would have had no jurisdiction to review such state constitutional determinations, no matter if federal standards were borrowed or used in making the determinations.

Here again, the guidance of this Court is urgently needed as to how to preserve this Court's ultimate jurisdiction over First Amendment claims — claims that were indirectly adjudicated by state courts and then buried in federal courts through invocation of the federal full faith and credit statute. Is it enough to say, as the Second Circuit said, that "the issues decided and the standards applied by the New York courts are the same as those that would be dispositive under the First Amendment"? Pet.App. A-29. And is it enough to say, as the Second Circuit said, that this Court "would remain free" to review the decision below only if the federal courts were mistaken in thinking that the state court determinations accurately mirrored federal free speech law? *Id.*

The severe and dire consequences of the Second Circuit's decision are being felt throughout New York and elsewhere. Recent newspaper articles report that scores of adult establishments have already been padlocked and many more have voluntarily censored their expression.[1] Similarly, it is a matter of public record that municipalities across the state and nation have patterned adult zoning ordinances based upon New York City's challenged Zoning Resolution. The considerable impact of the Second Circuit's decision on free expression and access to federal courts, as well as the inherent importance of the questions presented by this petition, warrant a full review of the case by the Court.

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[1] *See e.g.*, *Giuliani Vows More Closing of Sex Shops*, NEW YORK TIMES, Aug. 30, 1998 at B.33; CHRISTIAN SCIENCE MONITOR, Sept. 29, 1998 at 3 (21 of the businesses closed their doors and the City has tried to shutter another 29); NEW YORK TIMES, Oct. 18, 1998 at 39 (as of October 14, 1998, the total number of shops affected by the enforcement had risen to 59). More closure actions are being brought against bookstores and theaters each week.

CONCLUSION

For all the foregoing reasons, as well as those raised in the original petition, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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